

CANADA / JUDGMENT

N.M.R. v. Z.W.F.

2024 BCSC 452

COURT

Supreme Court of British Columbia

DECIDED

15 March 2024

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2024 BCSC 452 N.M.R. v. Z.W.F.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

N.M.R. v. Z.W.F.,

2024 BCSC 452

Date: 20240315

Docket: E220864

Registry: Victoria

Between:

N.M.R.

Claimant

And

Z.W.F.

Respondent

Before: The Honourable Mr. Justice G.R.J. Gaul

Reasons for Judgment

Counsel for the Claimant:

J. Macdonnell

Counsel for the Respondent:

T. Brown, K.C.

Place and Date of Hearing:

Written submissions of the Respondent:

Written submissions of the Claimant:

Victoria, B.C.

September 9, 2022

November 24, 2022

January 4 - 5, 2023

April 6, 2023

April 13, 2023

April 20, 2023

Place and Date of Judgment:

Victoria, B.C.

March 15, 2024

Introduction

- [1] The focal point of this litigation is a young boy who was born in the state of New Jersey in the United States of America and now resides in Victoria, British Columbia (the "Child").
- [2] The claimant is the Child's mother. The respondent is the Child's father.
- [3] Not only is the Child caught between his parents in this acrimonious family law matter, he is also caught between two legal jurisdictions: the State of Florida, in the U.S.A. and the province of British Columbia, in Canada.

Background Facts

The claimant

- [4] The claimant is 48 years old and was born and raised in Victoria, British Columbia. She graduated from high school and pursued post-secondary studies at a college in Victoria.
- [5] In or around 2005 she moved to New Jersey so that she could be with a prior romantic partner. That prior spousal relationship ended when the claimant and her former partner were divorced in January 2011.
- [6] While residing in the U.S.A., the claimant was employed as a bartender and as a fit model.
- [7] The claimant has maintained a close connection with British Columbia, as much of her family and many of her friends continue to reside in Victoria.

The respondent

- [8] The respondent is 43 years old. I know little of his personal history except what the claimant says about him and their relationship in the four affidavits she has sworn and filed in this matter.
- [9] In her first affidavit, the claimant attests:
9. I witnessed the Respondent's heavy use and abuse of alcohol when we were together. He would often disappear for days while he would engage in binge drinking
16. The Respondent has no family in Florida besides his former mother-in-law who lives almost three (3) hours away from where I was living in Florida. She was married to the Respondent's father who has relocated to Arizona (USA) and has no relationship with the Respondent
- [10] In her second affidavit, the claimant describes her safety concerns, including referencing the fact that the respondent has threatened her with physical violence in the past.
- [11] From an evidentiary perspective, it is odd and quite surprising that the respondent did not file any evidence responding to the claimant's assertions about him and his behaviour during their relationship. It is equally puzzling why he did not prepare and file an affidavit in support of this application until November 2022, nearly three months after the hearing before me had started. Furthermore, I note that the respondent's affidavit provides no evidence relating to his personal background or current circumstances, the parties' marital relationship and its dissolution, or his historical role as the Child's father. Instead, the expressed purpose of the affidavit is to reply to the claimant's third affidavit and more particularly her description of the events that occurred in early September 2022 when the respondent came to Victoria to spend time with the Child.

The Child

- [12] The Child was born in New Jersey, U.S.A. He is now 12 years old.
- [13] The Child is a dual Canadian and American citizen and has always lived with his mother. She has been his principal caregiver since his birth. The respondent has played a very minimal role in the Child's life.
- [14] The Child and his mother moved to Victoria in July 2021. Prior to their relocation, they lived in Fort Myers, Florida. The respondent lived some 253 kilometres away in Miami, Florida.
- [15] For the first few years of the Child's life, he and the claimant would return to Victoria for the summer to spend time with the claimant's family and friends.
- [16] By all accounts, the Child is a bright and intelligent young person who has settled into a healthy and positive routine in Victoria. Regrettably, the Child's relationship with the respondent is a stressful one for everyone involved. The evidence before the court supports that conclusion. Given the respondent's limited involvement over the course of the Child's

short life, the Child presently does not wish to have much to do with the respondent. Perhaps that will change as the Child matures; however, for now, that prospect is a dim one, especially in light of these legal proceedings and the recent interactions between the Child and the respondent.

The Parties' Marital Relationship

- [17] The claimant met the respondent in or around 2010 while she was working as a bartender in Hoboken, New Jersey. The respondent was unemployed. The claimant was reluctant to get involved in another romantic relationship, given what had occurred in her previous romantic relationship. The respondent nevertheless pursued a relationship with the claimant. At paragraph 28 of her first affidavit, the claimant describes how the parties' relationship started:
28. I was very vulnerable when we met, having just gone through an upsetting breakup. I did not even want to go out with the Respondent in the first place but he would not take "no" for an answer. The Respondent would always show up at my work, try to walk me home and ask me out constantly. Finally, I said yes and before I knew it, I was pregnant and he was moving into my apartment. I did not know the Respondent well at that time, but he was so persuasive and manipulative I did not realize what he was doing to me.
- [18] The claimant became pregnant with the Child in or around October 2010. At the time, the respondent was still unemployed.
- [19] In or around December 2010, the respondent began working as a car salesman at a Maserati dealership in New York City. His annual salary was approximately \$80,000 USD.
- [20] The claimant continued her employment until the seventh month of her pregnancy.
- [21] In or around early March 2011, the parties began living in a marriage-like relationship. Later that month they were married. Their son was born three months later. In her first affidavit, the claimant explained:
7. At the end of my relationship with [her previous spouse], I never considered getting married again, but things changed when I got pregnant from the Respondent. At the time, the Respondent told me that if I did not marry him, he would move out of my house, leaving me pregnant with no income.
- [22] The parties' relationship was a tumultuous one. The claimant worked as a bartender and fit model, while the respondent moved between employment opportunities in the automotive industry. Because of the respondent's unreliable income and reckless spending habits, the claimant regularly paid for most family expenses. In her first affidavit, the claimant describes the parties' marital finances as follows:

30. The Respondent and I lived in my apartment in New Jersey, where we welcomed [the Child]. We eventually had to move due to increasing rental costs. We moved to a smaller, less expensive apartment but the Respondent lost his job at Maserati (where he worked from 2011 to 2013). Then the Respondent worked at Porsche for six (6) months but he was let go because of a non-disclosure agreement with Maserati. The Respondent then got another job with Dealer X in 2013 from June until September (3 months). That is when everything fell apart between us.
31. Even though I started bartending again, and withdrew funds from my Canadian RRSP and maxed out my credit cards to support us during this period, I could not support us on just my salary alone. We were evicted from my apartment, and moved in with some of the Respondent's friends from his church.
32. Due to the extreme financial instability of our lives, [the Child], the Respondent and I were forced to share a house with the Respondent's friends from his church. Thankfully, we did not have many bills during that time. Just food, cellphones and one car. We were supposed to pay the bills together, but I was always the one who had to make sure they were actually paid on time. At the time, my income was enough to cover the cost of those bills. The Respondent's financial contribution was sporadic at best and he relied upon me to earn the bulk of the money required to support our family. Despite my efforts to keep our family supported it was not enough.
35. I did everything with, and for [the Child], and always did my best to take care of him, whereas the Respondent has always put his own desires and needs first. For instance, our financial situation was a mess because as soon as the Respondent would make a bit of money, he would spend it for his own benefit. Never on important things like bills, food, health insurance or rent. Rather it was spent on alcohol for him, going out, and clothes.
37. The Respondent financially ruined me. Everything we had at the time was in my name. We went through all my savings and maxed out all of my credit cards. When I withdrew from my mutual funds, I was penalized by having to pay the taxes on those withdrawals. My credit in the United States is horrendous because of the Respondent's actions. I was barely able to bring my score back up before [the Child] and me returned home to Victoria (BC) Canada.
38. The Respondent, [the Child] and I were able to move out in January of 2015, but soon after, the Respondent lost his job. He spent money we did not have on "studio time", and refused to come home on several occasions leaving me stranded, not able to go to work because I had no one to watch [the Child]. The Respondent at this time believed that he was going to be a famous rapper/musician and was spending thousands of dollars we did not have pursuing this "dream" that left us destitute.
39. The Respondent spent our money on "studio time" without telling me as it was, and still is, his fantasy of becoming a rap music artist. During our marriage, a significant amount of money was spent on studio time for him instead of being used for the purposes of paying our rent, bills and for buying food. I was barely able to support us financially at this time.

When I asked the Respondent to stop spending our money on studio time and to help support our family financially, he would simply ignore my requests and continue to spend our money as he saw fit. It was incredibly stressful not knowing on a daily basis if we would have enough money to feed [the Child], pay our rent or keep the electricity on.

40. As a result of the Respondent being so unreliable with respect to helping me take care of our son, I ended up being fired from my job because I had missed too many shifts. I missed those shifts because the Respondent would not come home to take care of our son when I had to be at work. Rather, the Respondent prioritized his studio time over the care of our son, and my ability to earn enough money to keep supporting us through this difficult period of time. This is the one and only job I lost because of the Respondent, and that was the last straw with our relationship.
- [23] The parties separated on 1 April 2015. Shortly thereafter, the respondent left New Jersey and relocated to Miami, Florida to pursue an employment opportunity as well as a new intimate relationship.
- [24] The respondent left the claimant and the Child in New Jersey without making any arrangements to pay child support or anything else relating to the Child's wellbeing.
- [25] After the respondent had left New Jersey, the claimant commenced a new intimate relationship with man named Adam. This person quickly developed a close parental bond with the Child.
- [26] The claimant, her new partner and the Child relocated to Florida in December 2015. A key factor in making the move was the claimant's earnest belief that the Child should have the opportunity to develop a relationship with his biological father.
- [27] The claimant, Adam, and the Child settled in Fort Myers, Florida, which is approximately 253 kilometres or around a two-and-a-half-hour drive to Miami.
- [28] Notwithstanding significant efforts on the claimant's part, the parties were unable to establish a parenting regime that had the respondent having parenting time with the Child on a regular or established basis. Based on the evidence before me, the failure to create a parenting regime was because of the respondent's disinterest and inability or unwillingness to reliably attend for agreed upon parenting time with the Child. In other words, I find the failure to establish a parenting time regime falls principally at the respondent's feet.
- [29] In or around April 2021, the claimant's relationship with Adam came to an end. Their separation was an amicable one with Adam continuing to be a positive influence in the Child's life. It would appear from the uncontested evidence provided by the claimant, that the respondent was supportive of Adam playing a parental role in the Child's life.
- [30] In July 2021, the claimant and the Child relocated to Victoria. The claimant maintains this was done with the knowledge, consent, and approval of the respondent, given he was in the process of leaving Florida and relocating to California.

[31] I will repeat at this point that I have no evidence from the respondent that addresses any of the points the claimant makes in her evidence relating to the nature of their relationship. In light of this, I am left to accept the claimant's evidence as the uncontested truth.

The Parties' Florida Divorce

[32] In April 2017, the parties filed a marital settlement agreement (the "Settlement Agreement") and a parenting plan (the "Parenting Plan") in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida (the "Florida Court"). The Florida Court issued a Final Judgment of Dissolution of Marriage, incorporating the terms of the Settlement Agreement and the Parenting Plan, on 26 June 2017 (the "Divorce Order").

[33] In support of his present application, the respondent filed two affidavits of Chad Laing, the respondent's legal counsel in Florida. In his second affidavit, Mr. Laing explains:

5. Paragraph III of the Parenting Plan entitled JURISDICTION specifically states:

The United States is the country of habitual residence of the child(ren).

The State of Florida was the Child's home state for the purposes of the Uniform Child Custody Jurisdiction and Enforcement Act.

6. Additionally, Paragraph XIV entitled RELOCATION of the Parenting Plan specifically requires that:

Any relocation of the child(ren) is subject to and must be sought in compliance with section 61.13001, Florida Statutes.

[34] Section 61.13001 of the 2016 Florida Statutes provides:

(2) RELOCATION BY AGREEMENT. -

(a) if the parents and every other person entitled to access to or time-sharing with a child agree to the relocation of the child, they may satisfy the requirements of this section by signing a written agreement that:

1. Reflects consent to the relocation;
 2. Defines an access or time-sharing schedule for the nonrelocating parent and any other persons who are entitled to access or time-sharing; and
 3. Describes, if necessary, any transportation arrangements related to access or time-sharing.
- (b) If there is an existing cause of action, judgment, or decree of record pertaining to the child's residence or a time-sharing schedule, the parties shall seek ratification of the agreement by court order without the necessity of an evidentiary hearing unless a hearing is requested, in writing, by one or more of the parties to the agreement within 10 days after the date the agreement is filed with the court. If a hearing is not timely requested, it shall be presumed that the relocation is in the best interest of the child and the court may ratify the agreement

without an evidentiary hearing.

- [35] The Divorce Order includes a provision requiring the respondent to pay the claimant \$1,150 USD per month commencing on 15 June 2015 and terminating on 15 June 2034. The order also stipulates that the respondent "shall pay an additional \$610 for child care expenses related to work or education for employment skills".

The Claimant's Relocation with the Child from Florida to Victoria

- [36] The claimant's evidence relating to her relocation to Victoria with the Child is clear and comprehensive. In essence, she maintains that their relocation to Victoria in or around July 2021 was at the instigation of the respondent and with his full consent and approval. The claimant says the respondent encouraged the relocation and approved of it because he recognized it would facilitate his contact with the Child, given his own imminent relocation from Florida to California.
- [37] The claimant also says that her relocation with the Child to Victoria was financially necessary for her and in the Child's overall best interest. The claimant had no connection to Florida, beyond having lived there for approximately five years. All of her family members and close friends were in Canada, principally British Columbia. Of critical importance, the respondent was not paying the claimant the child support that he was obliged to pay pursuant to the Divorce Order. The evidence on this last point satisfies me that of the approximate \$110,000 USD the respondent owes the claimant in court-ordered child support and additional payments for the Child, he has only paid \$8,000 USD.
- [38] Around the same time as the claimant and Adam were ending their relationship, the respondent initiated a discussion with the claimant about him leaving Florida and relocating to California and her moving with the Child back to her home in Victoria. The unchallenged evidence of the claimant on this point is clearly set out in her first affidavit:
63. Coincidentally, around the time of my separation with Adam (around April or May 2021), the Respondent asked me if I was ready to move home to Victoria (BC) because he was definitely moving to California. I have been asking the Respondent for years, and he always said no until that specific time.
64. Although this was a verbal conversation between the Respondent and me, I remember clearly that he called me while I was on the highway driving to work. Even though the Respondent has refused to admit to that, I affirm that I would have never moved back home with [the Child] without his permission. Despite everything that happened in our lives because of the Respondent's lack of responsibility, I have always respected his views.
65. The reason behind the Respondent's offer to move back to Canada is that the Respondent was eyeing a "business opportunity" in California. He asked if I still wanted to move home, as he would be willing to let [the Child] go to Canada now that he would also be on the West Coast.

[39] A text message the respondent sent to the claimant on 13 May 2021 explained:

Hey just got back from California, looks like I'm gonna (sic) need to move there very soon. I signed a deal with Kanye West's manager John Monopoly. We're about to really move now.

[40] The conversation between the claimant and the respondent about the claimant and the Child relocating to Victoria continued over the course of the next few months and resulted in the claimant making plans and taking active steps to complete their move in July 2021.

[41] Text messages between the claimant and the respondent on 19 July 2021 indicate that the respondent had a letter permitting the claimant to travel with the Child to Victoria and that he would provide it to her later that week. That letter was never provided to the claimant.

[42] On 31 July 2021, the claimant sent the respondent the following text message:

Good morning

I know you said [the Child] and I can move back to Victoria BC Canada. But before we pack our whole lives, can you please confirm in writing that you are allowing us to do so, that you are moving to California to be closer and we will be putting a visitation plan together.

[43] That same day, the respondent replied to this text with "Yes, I confirm" [emphasis added].

[44] The next day, 1 August 2021, the respondent sent the claimant the following text:

Let's figure out a schedule that we agree to in advance and then I will write a formal letter and have it notarized. Prob (sic) wise to have a lawyer draft the letter honestly.

[45] The claimant had all of her household possessions and personal belongings, along with those of the Child, shipped from Florida to Victoria. The Child's pet cats were also transported from Florida to Seattle, Washington, where the claimant retrieved them and took them back to Victoria with her.

[46] Upon her arrival in Victoria, the claimant secured full-time employment as well as a stable and suitable home for herself and the Child. In the fall of 2021, the Child was registered at a local school.

[47] The claimant maintains that she has made genuine and concerted efforts to arrange for the respondent to have in-person parenting time with the Child, as well as parenting time via video-conference and telephone calls. The efforts to arrange for in-person parenting time in Victoria, generally came to nought as the respondent continually postponed his trips.

[48] The one occasion in September 2022 when the respondent met with the Child in a local Victoria restaurant went very badly for all concerned. In his one and only affidavit, the respondent explains why, in his view, his parenting time with the Child ended after only a few minutes, following a verbal confrontation with the claimant and with the Child in tears. The gist of the respondent's evidence is that he believes the claimant intentionally orchestrated the meeting so that it would end with the Child being unhappy and the

respondent being frustrated.

- [49] Aside from his evidence relating to his encounter with the Child and the claimant in September 2022, the respondent has provided no evidence contradicting the claimant's evidence relating to her and the Child's relocation to Victoria. As a matter of fact, the respondent has provided no evidence whatsoever about the relocation. This includes providing no evidence contradicting the claimant's assertion that the relocation was initiated by the respondent himself because of his own imminent relocation from Florida to California or her assertion that he had supported and consented to the relocation.
- [50] I have no reason to doubt the credibility or reliability of the claimant's evidence on this issue or any of the other key issues in this proceeding. With nothing from the respondent contradicting the claimant's version of events, I accept her evidence and in particular her evidence that relocating to Victoria with the Child was in the Child's best interest and that the respondent had clearly and unequivocally consented to their move.

Court Proceedings in British Columbia

- [51] The respondent failed to abide by the terms of the Divorce Order and pay the claimant the required amount of child support on a regular basis. This failure on the respondent's part has placed a significant strain on the claimant and her limited financial resources.
- [52] The parties' relationship deteriorated to such an extent that the claimant was compelled to start this family law action in British Columbia on 11 March 2022 (the "BC Action"). In the BC Action, the claimant seeks an order establishing a proper parenting regime for the Child, focussed on his well-being and best interests. Specifically, she seeks in her notice of family claim the following orders:
- a) Under ss. 72-74 of the Family Law Act, SBC 2011, c. 25, (the "FLA") that the Supreme Court of British Columbia has the jurisdiction and authority to hear the claimant, and make binding orders in relation to same;
 - b) Under s. 183 of the FLA, an order that the respondent be restrained from directly or indirectly communicating with the claimant, except through counsel; and
 - c) That the Child remains in Victoria, BC with the claimant.
- [53] The claimant also seeks an order directing the respondent to pay child support as well as an order that his parenting time with the Child be supervised and take place in Victoria.
- [54] The respondent filed his response to family claim as well as a counterclaim on 22 April 2022. The claimant filed her response to the counterclaim on 10 May 2022.

- [55] On 6 May 2022, counsel for the respondent scheduled a judicial case conference for 8 August 2022. That conference took place with the respondent attending by video conference. His counsel was also present at the conference. The claimant and her counsel were present as well.
- [56] The judicial case conference was the last step in the BC Action until the respondent filed the present application.

Court Proceedings in Florida

- [57] Further complicating things is the fact that two and a half months after the claimant had started the BC Action, the respondent started his own proceedings in the Florida Court (the "Florida Action"). Multiple orders have been made in the Florida Action, including the following:
- a) Order on Father's Motion for return of Child to the Jurisdiction, dated 25 May 2022 and entered on 31 May 2022 (the "May 2022 Order");
 - b) Order granting the Father's verified Motion for the Return of the Child to Miami-Dade County and for Pick Up Order, dated 29 June 2022 and entered on 12 July 2022 (the "July 2022 Order");
 - c) Pick Up Order Requiring Return of the Child to Florida, Authorizing Father to Pick Up Minor Child, Ordering Mother to Cooperate in Father's Pick Up of the Child and Preventing Mother from Removing the Child from the Court's Jurisdiction, dated 4 August 2022 and entered on 12 August 2022 (the "August 2022 Order"); and
 - d) Order Adjudicating the Mother [the claimant] in Willful Civil Contempt of the Order Granting Father's Verified Motion for Return of Child to Miami-Dade County and Pick-Up and Order of Confinement, dated 11 October 2022 and entered on 20 October 2022 (the "October 2022 Order").

Nature of the Proceedings

- [58] The respondent's original notice of application in this matter, filed 30 August 2022, was deficient in that the relief sought relied upon the incorrect provisions of the FLA. That deficiency was identified during the hearing and necessitated the filing of an amended notice of application on 13 September 2022 (the "Amended Notice"). The relief sought in that Amended Notice consists of the following:
- a) An order pursuant to Division 7, in particular Sec. 75 of the Family Law Act to recognize extraprovincial orders; that being the Circuit Court of the 11th Judicial Circuit, in and for Miami-Dade County, Florida, heard on August 4, 2022, and signed on August 12, 2022.

- b) An order that the Circuit Court of the 11th Judicial District in and for Miami-Dade County, Florida be recognized by the British Columbia Supreme Court and that the court give effect to that court order under sec. 75(2) and made any necessary orders to give effect to that order.
 - c) An order that a party return the child to Pompano Beach, Florida, and to pay all of the expenses reasonably and necessarily incurred for travel and other expenses of the child and the Respondent.
 - d) An order that Mr. Justice Gaul communicate with Judge Cuesta from the Circuit Court of the 11th Judicial Circuit, in and for Miami-Dade County, Florida, pursuant to the Supreme Court of British Columbia, Practice Direction 57.
- [59] The claimant opposes all of the relief sought. In doing so, she maintains that the respondent not only consented to her relocation with the Child to Victoria but indeed initiated and encouraged it. Moreover, she contends that having done so, the respondent cannot at this point resile from his earlier position and seek to have the terms of the Divorce Order enforced, especially the provision of the Parenting Order that requires an order of the Florida Court before either party can relocate from the state with the Child.

Discussion

- [60] The claimant says the respondent agreed to her relocating to Victoria with the Child. The respondent denies this. He maintains he only agreed to allow them to travel there for a limited period and that the claimant agreed to return with the Child to Florida in September 2021. Therein lies the foundation of the present dispute.
- [61] Below, I first set out the legislation that guides my decision in making sense of what is in the best interests of the Child in this case. I then set out the legislation as it relates to the potential recognition and enforcement of extraprovincial orders.

The Best Interests of the Child framework

- [62] Section 37 of FLA provides direction as to how to evaluate the best interests of a child:

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 the person's 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 the person's 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.
- [63] References to the concept of the best interests of the child permeate Division 7 of the FLA, which deals with extraprovincial matters respecting parenting arrangements. Indeed, it is one of the stated purposes of this division of the FLA:

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.

[Emphasis added.]

- [64] In making my decision, I am guided by the FLA's direction to take seriously what evidence I have before me that is in the best interests of the Child at the centre of this litigation.
- [65] In this case, the complainant's decision to relocate engaged with many of the considerations set out in s. 37(2) of the FLA. In particular, the move to Victoria and subsequent time living in the jurisdiction corresponded with a focus on building strong relationships with the Child's maternal side of the family while also being closer to the respondent's proposed move across the country (subsection (c)) and to maintain a sense of stability in the Child's schooling and socialization, given the Child's age and stage of development (subsection (e)). Without seeking to alienate the Child from the respondent, it is also clear that the Child has his own views and a potentially negative perception of the respondent (subsection (b)). By comparison, the respondent has adduced no evidence as it relates to how a return to Florida would be in the Child's best interests, especially in light of the Child's current stability in Victoria.
- [66] While I appreciate that issues in family law cases involving a child can be contentious and involve significant acrimony, the child's best interests must nevertheless always be at the core of any parenting decision. In my opinion, the deficiencies in the respondent's pleadings and evidence and the position he has maintained on this application highlight a failure on his part to properly consider the Child's best interests and instead appear to be principally motivated by his desire to punish the claimant.

Communicating with the Florida Court

- [67] The respondent requests that I speak with the Honourable Judge Cuesta of the Florida Court, pursuant to the Supreme Court of British Columbia's Practice Direction #57. The title of the Practice Direction is "Court-to-Court Communications in Cross-Border Cases" and it reads as follows:

Summary:

This Practice Direction rescinds previous Practice Direction 6 and confirms the Supreme Court's adoption of the Judicial Insolvency Network's Guidelines for Communication and Cooperation between Courts in Cross-border Insolvency Matters ("Guidelines") in all cross-border matters.

Direction:

1. The Guidelines, which are available at the link below, should be followed in all cross-border actions requiring court-to-court communications including, but not limited to, insolvency and family proceedings.

<http://www.jin-global.org/content/jin/pdf/Guidelines-for-Communication-and-Cooperation-in-Cross-Border-Insolvency.pdf>

2. Unless otherwise ordered by the court, the adoption of the Guidelines does not change any requirement to comply with a rule and procedure governing proceedings in British Columbia.
- [68] Counsel for the respondent could not identify any particular reason why I should or would speak with Judge Cuesta. Instead she proposed that if I wanted to or felt the need to do so, then I should.
- [69] In my opinion there is no identifiable need for me to speak with Judge Cuesta. Consequently, I decline to do so.

Is the August 2022 Order an "extraprovincial order" under s. 72(1) FLA?

- [70] During the course of the hearing, respondent's counsel helpfully clarified that the principal relief being sought was an order that the August 2022 Order be recognized in British Columbia as an extraprovincial order, pursuant to sections 72(1) and 75 of the FLA.
- [71] Section 72(1) of the FLA defines an "extraprovincial order" as "an order of an extraprovincial tribunal that is similar in nature to an order respecting guardianship, parenting arrangements or contact with a child".
- [72] Once identified as an extraprovincial order pursuant to s. 72(1) of the FLA, s. 75 establishes the criteria that must be met before recognizing the order. Section 75 provides:

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.
- (2) On recognition by a court,
- (a) an extraprovincial order has the same effect, and may be enforced, as if it were an order made under section 45 [orders respecting parenting arrangements], 51 [orders respecting guardianship] or 59 [orders respecting contact], as applicable, and
 - (b) the court may, if necessary to give effect to the extraprovincial order, make any order that the court may make under this Act.

- (3) If an application is made to recognize more than one extraprovincial order and the orders conflict, the court must recognize the order that is most consistent with the best interests of the child.
- [73] Based on the evidence and submissions presented on this application and the fact that the Florida Court order the respondent seeks to have recognized under the FLA is the August 2022 Order, I am satisfied the respondent only wishes to have the Child returned to Florida, and nothing else. In others words, the respondent's application is not about guardianship, parenting arrangements or contact with the Child; it is strictly about compelling the Child's physical return to Florida.
- [74] In *F.B. v. Director (NWACFS)*, 2015 BCPC 101, the Honourable Judge Marchand, as he then was, explained the intention and purpose of ss. 72-76 of the FLA as follows:
- [44] I turn next to consider the actual words used in the FLA.
- [45] The term "extraprovincial order" as defined in s. 72(1) of the FLA refers specifically to orders "which are similar in nature to an order respecting guardianship, parenting arrangements or contact with a child". This definition falls within Part 4 of the FLA which deals with "Care of and Time with Children." The terms "guardianship", "parenting arrangements" and "contact with a child" each has a specific meaning in the FLA and each has its own Division within Part 4 of the FLA.
- [46] While child protection legislation and orders may use similar terms or tread on similar territory to family law legislation and orders, child protection legislation and orders have a distinct purpose and involve different considerations. In my respectful view, child protection orders are not "similar in nature" to the types of family law orders intended to be captured in the definition of "extraprovincial order" in the FLA.
- [47] Any doubts about the intended scope of the terms "guardianship", "parenting arrangements" and "contact with a child" as used in the ss. 72 to 76 of the FLA can be removed by reference to s. 75. Section 75(2)(a) specifically provides that "(o)n recognition by a court an extraprovincial order has the same effect, and may be enforced, as if it were an order made under section 45 [orders respecting parenting arrangements], 51 [orders respecting guardianship] or 59 [orders respecting contact]". Sections 45, 51 and 59 are all found within Part 4 of the FLA.
- [48] The drafters of the FLA, in my view, clearly intended ss. 72 to 76 of the FLA to deal only with extraprovincial orders made under family law and not child protection legislation.
- [75] Given that the August 2022 Order only relates to the return of the Child to Florida, I find it does not fit within the definition of an extraprovincial order found in s. 72(1) of the FLA and is not the type of order encompassed by the intended purpose of Division 7 of the FLA. Consequently, the respondent cannot rely on s. 75 of the FLA to have the August 2022 Order recognized in British Columbia.

[76] In my opinion, this puts an end to the principal relief sought in respondent's application.

Is British Columbia the appropriate forum to determine issues relating to the Child?

[77] If I am wrong and the August 2022 Order falls within the s. 72(1) FLA definition of an extraprovincial order, then I would still find that British Columbia is the appropriate forum to address all issues relating to the Child.

[78] I acknowledge that in her May 2022 Order, Judge Cuesta found that the Florida Court has "continuing jurisdiction to address [the respondent's] Emergency Motion for Return of the Child". Moreover, I accept that relying in part on the May 2022 Order, Judge Cuesta observed in her July 2022 Order that the Florida Court "has already exercised and continues to exercise jurisdiction over [the Child]". Finally, I note that the August 2022 Order, the only order the respondent seeks to have recognized in British Columbia, specifies that the Florida Court "retains jurisdiction over [the claimant], [the respondent] and [the Child] and this cause, to enforce this Order and to enter such further Orders allowed under Florida law".

[79] The claimant submits she never deferred to the jurisdiction of Florida as being the appropriate legal forum to resolve the parties' dispute over where the Child should reside. Her position is that Florida is not the appropriate legal forum to resolve this matter, and argues that this Court is better situated to do so.

[80] With great respect to Judge Cuesta's decision, s. 75(1) of the FLA specifies that in order to recognize an extraprovincial order, a court must take into account all of the following factors:

- (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.

[81] I do not find that the respondent has provided me with enough evidence to demonstrate that the Florida Court was required by law to consider the best interests of the child. This is not to say that the Florida Court is not required by law to consider the best interests of the child. Rather, given the animating force of the best interests of the child framework in British Columbia, it is that the respondent has not adduced sufficient evidence to establish this fact.

- [82] Notwithstanding the judicial pronouncements from the Florida Court, I agree with the claimant's position. In this regard, I remain convinced, given the evidence presented before me and keeping in mind the best interests of the Child, that British Columbia is the appropriate forum in which to address all legal issues relating to the Child.
- [83] The Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 [CJPTA] is the starting point for the Court to decide whether it has territorial competence: *S.R.L. v. K.J.T.*, 2014 BCSC 597 at para. 17. The CJPTA recognizes that the Legislature or Parliament may create different rules for determining territorial competence or jurisdiction by passing legislation: *Price v. Srivastva*, 2020 BCSC 1109 at para. 33. Moreover, s. 12 of the CJPTA recognizes the predominance of other Acts that confer jurisdiction or territorial competence; the FLA is one such Act: *S.R.L.* at para. 22.
- [84] Section 74 of the FLA empowers a court, under certain conditions, to make an order respecting guardianship, parenting arrangements or contact with a child, if such an order may be made in more than one jurisdiction:
- 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.

[85] Section 72 of the FLA defines habitual residence as follows:

72 (1) In this Division:

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

(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

(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.

[86] The Court in *Price* said the following on the analysis where the court decides whether or not to exercise its jurisdiction:

[40] In any event, this principle that the jurisdiction of a child's habitual residence is the jurisdiction best suited to determine the child's best interests is an underlying assumption in the FLA, reflected in the wording of Division 7 of Part 4, that: see *Shortridge-Tsuchiya v. Tsuchiya*, 2010 BCCA 61 at para. 38; *Droit de famille* at para. 39. It is also subject to rebuttal under both Articles 8 and 9 of the 1996 Hague Convention and s. 74(3) of the FLA.

[41] Division 7 of Part 4 of the FLA governs jurisdictional issues with respect to guardianship, parenting arrangements, or contact with the children. Section 74(3) of the FLA contains a *forum non conveniens* provision:

(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.

[42] In assessing whether the court should decline to exercise jurisdiction with respect to guardianship, parenting arrangements, or contact, it is useful to consider the purposes set out in s. 73 of the FLA

[43] The factors that apply on a *forum non conveniens* analysis, and which are engaged under s. 74(3) of the FLA, are codified in s. 11 of the CJPTA: *Shortridge-Tsuchiya* at para. 60. Section 11 of the CJPTA provides as follows:

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.

[44] These factors are not exhaustive. In determining whether to decline jurisdiction, the court can consider other relevant factors such as the purposes set out in s. 73 of the FLA, including the best interest of the children: Shortridge-Tsuchiya at para. 61.

[87] The claimant filed her Notice of Family Claim on 11 March 2022. The respondent filed his Notice of Application on 30 August 2022, and his Amended Notice of Application, which is at issue before the Court now, on 13 September 2022. The Child was living with the claimant in British Columbia at the time, and had been since July 2021. I am quite satisfied, on the evidence before me, that the respondent not only willfully and knowingly consented to the claimant's relocation to Victoria with the Child; he specifically initiated the process out of self-interest, knowing or at least believing at the time that he too would be leaving Florida and relocating to the West Coast of the U.S.A.

[88] I am equally satisfied that the respondent knowingly acquiesced in the change of the Child's habitual residence from Florida to Victoria for the purposes of s. 72(3) of the FLA.

[89] For reasons that remain unexplained, the respondent appears to have abandoned his plans to move from Florida to California. That development was not influenced by anything the claimant or the Child did or did not do. I accept that the claimant relied on the respondent's clear representation that he would be leaving Florida and moving to California as one of the principal reasons for her relocating her life and the Child's life to Victoria. I also accept that the claimant did so with the best interests of the Child in mind. The Child's new home would be in a stable community with strong family connections. Additionally, the Child would be geographically closer to the respondent's new California residence, meaning it would, in all likelihood, be much easier for the respondent to exercise in-person parenting time with the

Child. In my opinion, the claimant's relocation with the Child to Victoria made imminent sense and was clearly in the Child's best interests.

- [90] In my view, the respondent is being disingenuous when he attempts to rely upon Florida law, and in particular the Divorce Order and the August 2022 Order, to compel the Child's return to Florida, when it was he, in his own self-interest, who prompted and encouraged the claimant and the Child to leave Florida and relocate to Victoria. Equally important is the fact that the respondent did so without complying with the terms of the Divorce Order or Florida law or, alternatively, insisting that the claimant do so.
- [91] The respondent is also being hypocritical when he seeks to rely upon and enforce the terms of the Divorce Order and Florida law, when he himself has not complied with the order. In my view, in attempting to force the Child to return to Florida, the respondent is picking and choosing which parts of the Divorce Order and Florida law he wants to follow. I refer here to the fact that he has only paid a fraction of the child support that he was ordered to pay under the terms of the Divorce Order.
- [92] The respondent sought and obtained the October 2022 Order finding the claimant in civil contempt of court. That order directs Florida sheriffs to take the claimant into custody and for her to be incarcerated until she "purges herself of contempt and fully complies" with the August 2022 Order. While parents may disagree to an extreme extent, such an order effectively coerces the claimant to return to Florida despite the respondent's own prior inconsistencies with regard to Florida law in general and the Divorce Order in particular. If the claimant were to return to Florida and not follow the exact steps of the Florida Court orders (as the respondent has chosen not to do with his support obligations), then she would be incarcerated. This outcome would imperil the claimant's ability to serve as the Child's principal caregiver and be clearly contrary to the Child's best interests. Indeed, such a turn of events could further prejudice the Child against the respondent. This would, again, be contrary to the Child's best interests. Obviously, the October 2022 Order is a serious barrier to the claimant returning to Florida and gives weight to her submission that legal proceedings relating to the Child ought to be heard and adjudicated in British Columbia instead of Florida.
- [93] In my opinion, this Court has territorial competence over this matter. Moreover, I am satisfied, after having considered all of the circumstances of this case, that none of the factors listed in s. 11(2) of the CJPTA support the respondent's position that Florida is the appropriate forum to litigate issues relating to the Child. On the contrary, I find the factors favour the claimant's position and more than tip the balance in favour of British Columbia retaining and acting upon its jurisdiction in this matter.
- [94] As it stands, the respondent is seeking to enforce the terms of the Divorce Order that was granted pursuant to laws of Florida, without himself being in compliance with that order or those laws. I am firm in the belief that recognizing the August 2022 Order and directing that it be enforced in British Columbia, would significantly and materially disrupt the lives of

both the claimant and the Child. That, in my respectful view, would clearly be contrary to the Child's best interests. Moreover, I find granting the relief the respondent seeks would reward behaviour that is at odds with the core principles of the FLA and contrary to public policy in British Columbia. In light of this, and with all due respect to Judge Cuesta and the Florida Court, I am firmly of the view that given the circumstances of this case, British Columbia is the more appropriate venue to determine issues relating to the Child, including what is in his best interest.

Conclusion

- [95] I am satisfied that the August 2022 Order is not an extraprovincial order as that term is defined in s. 72(1) of the FLA. Consequently, the order is not one that can be recognized in British Columbia pursuant to s. 75 of the FLA.
- [96] Moreover, and in any event, I accept that it was the respondent who prompted and initiated the claimant's relocation with the Child to Victoria and that he did so, at least in part, out of self interest, given he too was planning on leaving Florida.
- [97] While the manner in which the relocation occurred may not have been in strict compliance with the terms of the Divorce Order or Florida law, it is evident that the respondent was quite prepared and willing to allow the relocation to happen in the manner that it did, when it suited his purposes. It was only after he had abandoned his expressed plan to relocate from Florida to California and after the claimant and the Child had settled in Victoria that the respondent changed his tune and sought to enforce the specific terms of the Divorce Order.
- [98] Leaving aside the fact that the respondent's about-turn and his commencement of the Florida Action have been materially disruptive to the claimant; and the fact that the respondent comes to this Court seeking judicial redress based upon a Florida court order whose child support terms he has failed to comply with; overall, I find it would be contrary to the Child's best interest to permit the respondent to use the August 2022 Order to force the Child's return to Florida.
- [99] Finally, and with all due respect to Judge Cuesta and the Florida Court, I am satisfied that British Columbia is and remains the most appropriate forum for the parties to address their family law issues, and in particular those relating to the Child.
- [100] For all of these reasons, the respondent's application is dismissed with costs to the claimant.

"G. R. J. Gaul, J."

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