

CANADA / JUDGMENT

Roman-Manarovici v. Manarovici

2022 BCSC 1159

COURT

Supreme Court of British Columbia

DECIDED

8 July 2022

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2022 BCSC 1159 Roman-Manarovici v. Manarovici

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Roman-Manarovici v. Manarovici,

2022 BCSC 1159

Date: 20220708

Docket: NW E63759

Registry: New Westminster

Between:

Irina Ioana Roman-Manarovici a.k.a. Irina Ioana Roman

Claimant

And

Michael Nicolas Manarovici

Respondent

Before: The Honourable Justice Kent

Reasons for Judgment

Counsel for Claimant:

T. Harding

Counsel for Respondent:

M. Katsionis

Place and Date of Hearings:

Vancouver, B.C.

May 17, June 30, 2022

Place and Date of Judgment:

Vancouver, B.C.

July 8, 2022

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1. INTRODUCTION AND BACKGROUND

- [1] Relocation disputes are the most difficult family law matters that come before this Court. Regardless of the outcome, heartbreak and great distress on the part of at least one of the two parents involved is inevitable. The decision often has a major impact on the future parenting of the children involved, one that can have lifelong effects.
- [2] This particular case was initiated in the Supreme Court of British Columbia by the mother who, against the wishes of the father, unilaterally relocated to Vancouver from Calgary in early September 2021 with the couples' two very young children, one of whom was less than two months old and the other who had just turned three years old at the time.
- [3] The mother filed her Notice of Family Claim in this Court on November 18, 2021. In that action she seeks:
1. An order for divorce pursuant to the Divorce Act, R.S.C., 1985 c. 3, [the "Divorce Act"] (although she does not yet qualify for such relief under s. 2(a) of that Act, the only asserted ground for the divorce);

2. A parenting order with respect to the children pursuant to both the Divorce Act and the Family Law Act, S.B.C. 2011, c. 25 [the "FLA"] (she proposes joint guardianship and joint custody of the children with the father, with the latter having "such reasonable parenting time as is in the best interests of the children");
 3. An order for child support under both the Divorce Act and the FLA;
 4. An order for spousal support under both the Divorce Act and the FLA; and,
 5. An order for equal division of family property and family debt under the FLA (the property primarily comprising the family home in Calgary and the parties' respective financial assets).
- [4] The father has not filed a formal Response to Family Claim. Instead, on November 30, 2021 he filed a "Jurisdictional Response" in the action challenging this Court's jurisdiction over him or, alternatively, if such jurisdiction exists, requesting that the Court decline to exercise such jurisdiction in the circumstances of this case.
- [5] The father has instituted competing family law proceedings in Calgary in the Court of Queen's Bench of Alberta, the Superior Court of that province. That proceeding was initiated on November 26, 2021. The originating application sought an order confirming the children to be residents of Alberta over whom the Court of Queen's Bench had jurisdiction, and a related parenting order.
- [6] On January 5, 2022 the father filed a further application in the Alberta Court seeking, among other things, an order for the children to be returned to Calgary. The matter came before Justice Nixon on January 18, 2022, at which time the matter was ultimately adjourned sine die. No written reasons for judgment were issued and no transcript of that proceeding is available. The clerk's notes merely indicate that the application was adjourned so that an "interim application" could be brought by the father "in British Columbia".
- [7] Counsel have advised the Court that, unlike the legislation in British Columbia, Alberta's Family Law Act, S.A. 2003, c. F-4.5 does not contain provisions expressly addressing relocation of children following separation of their parents. However, ss. 3 - 6.3 of the Divorce Act address the issue of jurisdiction of a Superior Court when multiple proceedings are issued in two different provinces. Section 6.2 of the Divorce Act specifically addresses jurisdiction of the Court in cases involving "removal" of "habitually resident" children from one province to another which has occurred "contrary to [the new "relocation provisions"] of the Divorce Act or contrary to provincial law". However, the precise legal basis for, or purpose of, Justice Nixon's order dated January 18, 2022 is not known to this Court.
- [8] On April 28, 2022, the father filed a Notice of Application in this Court seeking the following orders:
1. A declaration that the children of the marriage are "habitual residents" of Calgary, Alberta;

2. An order that the British Columbia Courts do not have jurisdiction over the children or any of the other matters raised in the mother's family law action in this province;
3. Alternatively, an order from the Court declining to exercise such jurisdiction; and
4. An order pursuant to s. 77(2)(c) of the FLA that the children be returned to Calgary, Alberta, within 30 days of the order.

2. THE APPLICABLE LEGAL PRINCIPLES

- [9] The analytical framework and legal principles applicable to an application such as this are set out in detail in the case of *A.K.S. v J.S.S.*, 2021 BCSC 2011 at paras. 23 to 40:

Applicable Law

- [23] As noted in *D.L. v. M.Y.*, 2019 BCSC 881, at paras. 27 to 28:
- [27] When a court determines whether to take jurisdiction over a dispute, it engages in a two-step analysis. First, the court determines whether it has territorial competence (sometimes called jurisdiction simpliciter) over the dispute. The burden of establishing territorial competence rests with the party asserting its existence: *Aleong v. Aleong*, 2013 BCSC 1428 at para. 80.
- [28] Second, the court determines whether it ought to exercise that jurisdiction, or whether, instead, there is another forum that is "clearly more appropriate": *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 103 [Van Breda]. This second step is sometimes referred to as a forum non conveniens analysis. The burden in this analysis rests with the party asserting that another forum is clearly more appropriate: *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2015 BCCA 200 at para. 45.
- [24] J.S.S. says the court should consider both the Divorce Act and the Family Law Act given that the alternative proceeding in Ontario seeks relief under both the Divorce Act and under Ontario's counterpart to the Family Law Act.
- [25] The Divorce Act allocates jurisdiction amongst the various provinces based on where the parties were "habitually resident". Section 3(1) provides as follows:

Jurisdiction in divorce proceedings

3 (1) A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been habitually resident in the province for at least one year immediately preceding the commencement of the proceeding.

- [26] As noted above, the claimant in this proceeding did not seek an order of divorce in the notice of family claim. I infer that this reflects a conclusion that the requirements of s. 3(1) would not be met, in that she would be unable to establish habitual residence in British Columbia for at least one year immediately preceding the commencement of the action.

[27] With respect to corollary relief proceedings, s. 4(1) of the Divorce Act states:

Jurisdiction in corollary relief proceedings

4 (1) A court in a province has jurisdiction to hear and determine a corollary relief proceeding if

- (a) either former spouse is habitually resident in the province at the commencement of the proceeding; or
- (b) both former spouses accept the jurisdiction of the court.

[28] The Divorce Act has specific provisions at s. 16.9(1) dealing with relocation of a child:

Notice

16.9 (1) A person who has parenting time or decision-making responsibility in respect of a child of the marriage and who intends to undertake a relocation shall notify, at least 60 days before the expected date of the proposed relocation and in the form prescribed by the regulations, any other person who has parenting time, decision-making responsibility or contact under a contact order in respect of that child of their intention.

It provides for a parent who does not agree to the relocation to require the matter to be brought before the court for determination.

[29] The steps provided for in this section were not followed in respect of the relocation of A.K.S. and F.S. to British Columbia.

[30] Section 6.2(1) of the Divorce Act provides that:

Removal or retention of child of marriage

6.2 (1) If a child of the marriage is removed from or retained in a province contrary to sections 16.9 to 16.96 or provincial law, a court in the province in which the child was habitually resident that would have had jurisdiction under sections 3 to 5 immediately before the removal or retention has jurisdiction to hear and determine an application for a parenting order, unless the court is satisfied

- (a) that all persons who are entitled to object to the removal or retention have ultimately consented or acquiesced to the removal or retention;
- (b) that there has been undue delay in contesting the removal or retention by those persons; or
- (c) that a court in the province in which the child is present is better placed to hear and determine the application.

[31] In the Family Law Act, Div. 7 of Part 4 deals with "Extrajurisdictional Matters Respecting Parenting Arrangements". For purposes of that division, key terms are defined in s. 72 and certain purposes are set out in s. 73:

Definitions and interpretation

72 (1) In this Division:

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

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

- (2) For the purposes of this Division, a child is habitually resident in the place where the child most recently resided
 - (a) with his or her parents,
 - (b) if the parents are living separate and apart, with one parent
 - (i) under an agreement,
 - (ii) with the implied consent of the other parent, or
 - (iii) under an order of a court or tribunal, or
 - (c) with a person other than a parent on a permanent basis for a significant period of time.
- (3) The removal or withholding of a child without the consent of a guardian does not affect the child's habitual residence unless the guardian from whom the child is being removed or withheld acquiesces or delays in applying for an order of a court or an extraprovincial tribunal.

Purposes

73 The purposes of this Division are as follows:

- (a) to ensure that court applications respecting guardianship, parenting arrangements or contact with a child are determined on the basis of the best interests of the child;
- (b) to avoid the making of orders respecting guardianship, parenting arrangements or contact with a child, respecting the same child, in more than one jurisdiction;
- (c) to discourage child abduction as an alternative to determining by due process the guardianship of, or parenting arrangements with respect to, a child;
- (d) to provide for effective enforcement of orders respecting guardianship, parenting arrangements or contact with a child, and for the recognition and enforcement of extraprovincial orders.

[32] Section 74 sets out limits on the jurisdiction of a British Columbia court to act under the Family Law Act:

Determining whether to act under this Part

74 (1) This section applies if an order respecting guardianship, parenting arrangements or contact with a child may be made, respecting the same child, in more than one jurisdiction.

- (2) Despite any other provision of this Part, a court may make an order under this Part respecting guardianship, parenting arrangements or contact with a child only if one of the following conditions is met:
- (a) the child is habitually resident in British Columbia when the application is filed;
 - (b) the child is not habitually resident in British Columbia when the application is filed, but the court is satisfied that
 - (i) the child is physically present in British Columbia when the application is filed,
 - (ii) substantial evidence concerning the best interests of the child is available in British Columbia,
 - (iii) no application for an extraprovincial order is pending before an extraprovincial tribunal in a place where the child is habitually resident,
 - (iv) no extraprovincial order has been recognized by a court in British Columbia,
 - (v) the child has a real and substantial connection with British Columbia, and
 - (vi) on the balance of convenience, it is appropriate for jurisdiction to be exercised in British Columbia;
 - (c) the child is physically present in British Columbia and the court is satisfied that the child would suffer serious harm if the child were to
 - (i) remain with, or be returned to, the child's guardian, or
 - (ii) be removed from British Columbia.
- (3) A court may decline to make an order under this Part if the court considers that it is more appropriate for jurisdiction to be exercised outside British Columbia.

[33] The relevant legal principles governing territorial competence are reviewed at length by Justice Matthews in *Y.Q. v. J.D.*, 2021 BCSC 943 at paras. 34 to 58. She describes the above-noted provisions of the Divorce Act and the Family Law Act which set out rules dealing primarily with territorial competence, other than s. 74(3), which reflects the principle of *forum non conveniens* or appropriate forum. As she notes at paras. 51 to 52:

- [51] The definition of habitual residence of a child does not preclude the consideration of common law principles; however, the statutory definition will take priority: *Aslanimehr v. Hashemi*, 2019 BCSC 804 at para. 42. Accordingly, the case law on the meaning of habitual residence under the Divorce Act is relevant to applications under the Family Law Act, at least to the extent it does not conflict with the above definition.
- [52] Since both the Family Law Act and the Divorce Act address territorial competence for parenting, it is necessary to consider whether there is an operational difference between the provisions. In the circumstances of this case, the issue on which the case will turn, under either legislative regime, is whether A.D. is habitually resident in B.C and whether Y.Q. consented to her removal to China or delayed in seeking her return. I am satisfied that the definition of "habitually resident" in the Family Law Act is not materially different from the common law definition relevant to the Divorce Act.
- [34] With respect to the determination of habitual residence, Justice Matthews notes at paras. 57 to 58 that:
- [57] The habitual residence of a child is tied to the habitual residence of his or her parents: Family Law Act, s. 72(2). As noted, the definition in s. 72(2) does not preclude common law definitions of habitual residence, at least to the extent that they do not conflict with the statutory definition. Under the common law, "a 'habitual residence' is established by residing in a place for an appreciable period of time, with a 'settled intention'": *Chan v. Chow*, 2001 BCCA 276 at para. 32; see also *Aslanimehr* at paras. 46-48, citing *Kong v. Song*, 2019 BCCA 84 at para. 75. A settled intention or purpose describes one's purpose for living where one does. If there is a settled intention or purpose, "it will stand out clearly as a matter of general impression": *Chan* at para. 34, citing *Cheshire and North's Private International Law*, 13th ed. (London: Butterworths, 1999) at 166-167.
- [58] Habitual residence is further described in *Rey v. Getta*, 2013 BCCA 369:
- [32] An habitual residence has been determined to be the place where children, who are wrongfully removed or wrongfully retained, resided for "an appreciable period of time" under the "settled intention or purpose" of their parents. A settled intention requires a "degree of settled purpose" that may include one or several purposes and be specific or general. While the duration of the residency may be a relevant factor, a settled purpose does not require a lengthy period of residency but may vary from a lengthy stay, to a fixed or limited period, or even as short as a day. A settled intention simply requires that "the purpose of living where one does has a sufficient degree of continuity to be properly described as settled".
- [Citations omitted].
- [35] The question of settled intention was considered in *Kong v. Song*, 2018 BCSC 1691, aff'd 2019 BCCA 84, at para. 20, where Justice Mayer adopted the approach set out by Justice Martinson in *Fasiang v. Fasiangova*, 2008 BCSC 1339, at paras. 60 to 71 and 74 to 75:

Settled Intention

- [60] A settled intention or purpose requires that "the purpose of living where one does has a sufficient degree of continuity to be properly described as settled." But all that is required is that there is a settled purpose. There is no requirement that there be an intention to settle indefinitely.
- [61] Further, a settled intention or purpose describes one's purpose for living where one does and it can be for a limited period. If there is a settled intention or purpose "it will stand out clearly as a matter of general impression".
- [62] A settled intention or purpose is "an intent to stay in a place whether temporarily or permanently for a particular purpose, such as employment, family, etc.".
- [63] Madam Justice Stromberg-Stein listed the following factors that may be considered in determining settled intention , this list is not exhaustive:
1. Both parties have relocated to the new state;
 2. The custodial parent is employed in the new state;
 3. The custodial parent had taken steps to satisfy the immigration requirements of the new state;
 4. The children were enrolled in school in the new state;
 5. The parents had purchased one-way tickets to the new state; and
 6. Accommodation has been arranged in the new state.
- [64] Settled intent to change habitual residence is determined just prior to the physical move to the new habitual residence.
- [65] When both parents share the intention to change the residence of their family, courts have not hesitated to find that the parents' intent controls the location of habitual residence.
- [66] If a family decides to permanently move to another country, and takes the required steps to do so (e.g. sell their house, quit their jobs) the family has effectively changed the habitual residence of their children. If one parent then decides that the move is not really what she wanted, she cannot "simply and unilaterally" remove the children from their new habitual residence.
- [67] In cases where parties no longer agree that they shared the intention to change their child's habitual residence, courts should not take the representations made by parties at their face value. Instead courts should determine, based on all the evidence, whether the parent has already agreed to change the child's habitual residence.
- [68] Settled intention alone is not enough, for habitual residence to be established the child actually has to move and an appreciable period of time must pass.

Appreciable Period of Time

- [69] Whether residence has been for an appreciable period of time is a question of fact.
- [70] An appreciable period of time is not a fixed period.
- [71] An appreciable period of time could be as short as one day.
- [73] Factors to take into account when determining whether residence has been for an appreciable period of time such that habitual residence has been established can include, but are not limited to: bringing personal possession to the new country; taking the necessary steps to establish residence before travelling to the new country; having a right of abode in the new country; seeking to bring family members to the new country; and, having "durable ties" with the new country.
- [74] The threshold for what constitutes an appreciable period of time will be different if the party is resuming habitual residence in a location rather than establishing residence in the location for the first time.

[citations removed]

- [36] A.K.S. argues it is possible for a person to have two habitual residences, referencing *Johansson v. Janssen*, 2021 BCCA 190, at para. 27:
- [27] The chambers judge concluded that the children had two habitual residences: Germany and British Columbia. The law recognizes that a child can have two habitual residences, however, it is usually in the context of where parents have joint parenting rights, and the child spends equivalent time in two jurisdictions: see *M.M. v. S.T.*, 2014 ABCA 120 at para. 16. Here, the situation is unusual in that the mother has two habitual residences, living in both Germany and British Columbia with the children for parts of each year.
- [37] Turning to the question of appropriate forum, as was noted by Justice Smith at paras. 29 to 30 of the trial judgment in *Johansson v. Janssen*, 2020 BCSC 1738, *aff'd* 2021 BCCA 190:
- [29] Factors relevant to the appropriate forum analysis under s. 74(3) are found in s. 11 of the [Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28]:
- 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.

[30] The list in s. 11 of the CJPTA is not exhaustive. A court may also apply considerations arising under the FLA, including the best interests of the children: *Shortridge-Tsuchiya v. Tsuchiya*, 2010 BCCA 61 at para. 61.

[38] As noted by Justice Brundrett in *C.L.Z. v. C.G.Z.*, 2018 BCSC 2172 at para. 52:

[52] In considering whether a court should decline jurisdiction, the factors in s. 11 of the CJPTA, and the purposes of s. 73 of the FLA are both relevant, given their degree of overlap as stated in Schubert:

[59] There is overlap between the factors expressed in s. 11 of the CJPTA and the purposes expressed in s. 73 of the FLA. In particular, the CJPTA and the FLA have common goals of avoiding a multiplicity of proceedings and conflicting judgments. The stated purpose of the FLA of avoiding abductions and the wrongful removal of children may be viewed as relevant to a consideration of the fair and efficient working of the Canadian legal system as a whole, as expressed in the CJPTA.

[39] The question at the appropriate forum stage is whether another forum exists that is "clearly more appropriate": *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 108.

[40] It appears to me that s. 6.2(1)(c) of the Divorce Act brings into play considerations of appropriate forum in much the same manner as s. 74(3) of the Family Law Act.

3. ANALYSIS

3.1 "Wrongful Removal"

[10] The mother's submissions on this application were largely focused on attempting to convince the Court that it was in the best interests of the children to remain in British Columbia. Emphasis was repeatedly placed on the requirement, now expressly mandated in both the recently amended Divorce Act as well as the FLA, that the Court "must take into consideration only the best interests of the children". In some respects, the mother is effectively asking the Court to retroactively rule on the merits of a relocation application that was never made before her unilateral departure from Alberta with the children.

[11] But there is another fundamental principle that must also be considered: the unilateral removal to another province by one parent of children formerly co-parented by both parents in a different province amounts to child abduction. Absent consent by both parents, both the FLA and the newly amended Divorce Act now require formal notice and a court

hearing before any such relocation is permitted. Except perhaps in extraordinary circumstances, such as urgently removing the children to safety from ongoing family violence or the like, the Court is rightly reluctant to endorse unilateral self-help relocation remedies such as the one which has occurred in this case.

[12] Section 77 of the FLA addresses "wrongful removal" of children:

Wrongful removal of child

77 (1) This section applies if a court

- (a) may not make an order or declines to make an order under section 74 [determining whether to act under this Part], or
 - (b) is satisfied that a child has been wrongfully removed to, or is being wrongfully retained in, British Columbia.
- (2) In the circumstances set out in subsection (1), a court may do one or more of the following:
- (a) make any interim order that the court is satisfied is in the best interests of the child;
 - (b) stay an application to the court for an order, subject to
 - (i) the condition that a party to the application promptly start a similar proceeding before an extraprovincial tribunal, or
 - (ii) any other conditions the court considers appropriate;
 - (c) order a party to return the child to a place the court considers appropriate and, in the discretion of the court, order a party to pay all or part of the expenses reasonably and necessarily incurred for travel and other expenses of the child and of any parties to or witnesses in the proceeding.

[Emphasis added]

[13] In the course of his submissions, counsel for the mother argued that the question of "wrongful" removal/retention is not determined with reference to parental "rights" but rather with reference only to the best interests of the children. I do not agree. And neither does our Court of Appeal:

[68] It is not the case that a parent's only rights to custody of, and/or access to, their children are defined by court order. At common law, and under [the now Family Law Act] the mother and father of a child who are living together are the joint guardians of the child with joint rights and obligations in relation to the child. If one parent unilaterally removes the child from the jurisdiction without the knowledge or consent of the other parent, this amounts to a wrongful taking of the child and a breach of the other parent's rights as joint custodial parent. The fact that there was no order in place may be relevant to the father's ability to enforce his rights, but the absence of an order does not mean that those rights are non-existent. This was the view of Madam Justice Levine in *Hewstan v. Hewstan*, 2001 BCSC 368,

where she stated, at para. 35:

There can be no doubt that one parent having joint guardianship rights over the person of a child cannot remove a child from the jurisdiction without the consent or over the objections of the other.

Shortridge-Tsuchiya v Tsuchiya, 2010 BCCA 61 [emphasis added]

[14] Another quote from Tsuchiya is apposite:

[37] The purposes of Part 3, headed "Extraprovincial Custody and Access Orders", are set out in s. 43 of the FRA [now s. 73 of the FLA with updated nomenclature] and are fourfold:

- (a) to ensure that applications to the courts in respect of custody of, access to and guardianship of children will be determined on the basis of the best interests of the children,
- (b) to recognize that the concurrent exercise of jurisdiction by judicial tribunals of more than one province, territory or state in respect of the custody of or access to the same child ought to be avoided, and to make provision so that the courts of British Columbia will, unless there are exceptional circumstances, refrain from exercising or decline jurisdiction in cases where it is more appropriate for the matter to be determined by a tribunal that has jurisdiction in another place with which the child has a closer connection,
- (c) to discourage the abduction of children as an alternative to the determination of custody rights by due process, and
- (d) to provide for the more effective enforcement of custody and access orders and for the recognition and enforcement of custody and access orders made outside British Columbia.

[emphasis in original.]

[38] I note that, while under Part 2 of the FRA the best interests of the child are stated to be "paramount", the best interests of the child under Part 3 must be read in the context of the other three purposes that Part 3 is designed to serve. Those purposes reflect the underlying assumption that a wrongful removal of children from one jurisdiction to another will, in most cases, be contrary to the children's best interests. This is so because such a move almost invariably interferes with meaningful contact between the children and one of their lawful parents or guardians, and with their other family, friends, school, and home in a manner which is necessarily disruptive of their sense of stability and security. There is also an underlying assumption, reflected in the wording of Part 3, that the state of the child's habitual residence is the jurisdiction best suited to a determination of the child's best interests. []

[emphasis added]

[15] In my view, where, as here, the children have been deliberately and wrongfully relocated to another province against the express wishes of the parent remaining in the province where they had habitually resided, that factor very strongly militates in favor of the other province not only declining jurisdiction but also issuing an order requiring the abducting parent to return the children. The underlying jurisdictional assumption in favor of the habitual residence should prevail unless exceptional circumstances exist.

3.2 Habitual Residence

[16] Sections 72(2) and (3) of the FLA provide the formula for determining the children's "habitual residence". In this case, such residency will be in the province of Alberta unless:

1. The father has "impliedly consented" to the children living with the mother in B.C.;
2. The father has "acquiesced" to their removal/withholding; or
3. The father has "delayed in applying for a court order".

[17] In my view, none of these criteria are met in the circumstances of this case. The evidence is very clear that the father not only did not consent but that he expressly objected, both in writing and verbally, to the removal of the children by the mother to British Columbia before it occurred. The mother knew full well that the father did not want the children to be moved but she proceeded nonetheless. Consent cannot be implied in such circumstances.

[18] Similarly acquiescence did not and has not occurred. The father has not reluctantly or silently accepted the new status quo. To the contrary, he is protesting the removal and has done so from the outset. He filed a lawsuit in the Albertan Court. He applied in that forum for an order requiring the return of the children. That application remains outstanding, albeit adjourned at the instance of the Court pending the outcome of the proceedings before me. In these proceedings he is objecting to the B.C. Court's jurisdiction and is seeking an order for the return of the children to Alberta. None of this amounts to reluctant acceptance without protest.

[19] The question of delay is more arguable, however I again resolve it in favor of the father.

[20] In the A.K.S. v J.S.S. case referred to above, the father moved with lightning speed. The mother had flown to B.C. with the child on July 23, 2021 and her return flight was booked for August 16, 2021. She did not take that flight but instead issued her family law action in the B.C. Supreme Court on August 24. The father issued his own family law proceeding in Ontario three days later on August 27, 2021 and four days after that filed his application in B.C. challenging that Court's jurisdiction. That application was heard by a judge of this Court three weeks later in September and judgment declining jurisdiction was issued one week later.

[21] The father in this case did not move with such alacrity as that displayed in A.K.S. v J.S.S. However, the affidavits filed in connection with this application contain numerous text and email communications between the parents and, later, their lawyers, attempting to

negotiate some sort of resolution to their separation. When it became clear that the mother would not be changing her mind and that the father would not move to B.C., and both before and after the January 2022 order of Justice Nixon in Alberta, efforts were made to negotiate parenting time for the father with the children in Vancouver. I note that, ironically enough, the mother's lawyer insisted on assurances from the father that he would not return the children to Alberta if he was given parenting time on his own.

- [22] Counsel for the mother put numerous emails between the lawyers into evidence. Regrettably, he repeatedly disparaged the communication style employed by the father's lawyer in Alberta and expressed relief that the latter was replaced by current B.C. counsel in January. He seems to be unaware how his own style of communication may have contributed to the perceived problem.
- [23] In any event I do not fault the father for delay. Communications between the parties aimed at interim resolutions, whether directly or through their counsel, should be encouraged and not treated as a form of acquiescence or delay for jurisdictional purposes. I do not consider any delay in obtaining a hearing before this Court to have been inordinate -- it is a challenging process even at the best of times, let alone while the Court is chronically short of its full complement, as has been the case for many years.
- [24] For the purposes of the current application under the Family Law Act, I find that the "habitual residence" of the children is Calgary, Alberta.

3.3 Jurisdiction under s. 74 of the Family Law Act.

- [25] Section 74(2) of the FLA bestows jurisdiction on this Court "only if one of [three] conditions is met" [emphasis added]. In other words, if those conditions are not met, then this Court cannot make an order under Part 4 of the FLA (respecting guardianship, parenting arrangements, etc).
- [26] I have found that, for the purposes of the FLA, the children are habitually resident in Alberta and so s. 74(2)(a) does not apply.
- [27] There is no expert evidence, and indeed not even a suggestion from the parties or other affiants, that the children would suffer "serious harm" if they were returned from B.C. to Alberta. The mother has chosen to swear an affidavit in which she makes it clear that if the Court orders the return of the children to Alberta, she will return with them. She says that life there will be challenging for her, both from a financial perspective and also in the absence of the physical family support she enjoys in B.C. However, she does not go so far as to argue that the task is impossible (I note she has recently received a substantial financial inheritance from her mother's estate which may facilitate matters), nor does she suggest the children will be seriously harmed by the experience. Hence the jurisdictional condition found in s. 74(2)(c) of the FLA also does not apply.

- [28] I would point out that, while the parents were both raised and first met in Vancouver, they jointly decided to move to Calgary in November 2011 when the father obtained employment there. They had lived in Calgary for almost 10 years before the mother's unilateral relocation occurred. They purchased an apartment downtown and later a newly built house in southeast Calgary. The mother went to medical school in Calgary and has completed her first year of residency there. The father obtained his MBA there and, while continuous employment has been challenging in the prevailing economic conditions, he is also attempting to start up his own business. Both children were born in Calgary. While the mother came to be personally unhappy there, understandably wanting to move back to her family in B.C., life in Calgary was in no way harmful to the children then, nor will it be if a return to that province is ordered by this Court for a determination of the required formal relocation process.
- [29] Section 74(2)(b) addresses the situation where, as here, the children are not habitually resident in B.C. when the application under the FLA is filed. It permits the Court to assume jurisdiction nonetheless but only if each one of six prescribed conditions are met. As noted in *A.K.S. v J.S.S.* at para. 54, these six factors are "conjunctive rather than disjunctive [] such that the court must be satisfied that all six factors are present in order for s. 74(2)(b) to found jurisdiction".
- [30] One of the six requirements, however, is that "no application be pending before the [Alberta] court for an order respecting parenting arrangements". This condition cannot be met; as noted earlier, there is a family law proceeding filed in Alberta by the father and his application regarding the children is still outstanding, albeit adjourned.
- [31] Another one of the six requirements is that "the child has a real and substantial connection with British Columbia". This "real and substantial connection" test is also found in the conflict of laws jurisprudence and is explicitly embodied in the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28. ["CJPTA"] as part of any determination of this Court's "territorial competence".
- [32] Certainly an argument can be made that the children have extended family in Vancouver and, having lived here for some 10 months, have become significantly "connected" to this province. However, in this regard I repeat the following passage from *A.K.S. v J.S.S.* with which I am in complete agreement:
- "[54] [] The fact that F.S. and A.K.S. are currently present in British Columbia provides at least some basis for the court to consider taking jurisdiction" under s. 74(2)(b)(i). It could arguably also found a real and substantial connection for purposes of s. 74(2)(b)(v). However, those provisions must be considered in light of s. 73 and the purposes that are to govern interpretation of the provisions, including the discouragement of unilateral relocations by one parent without consent of the other and in violation of the relocation provisions that appear in both the Divorce Act and the Family Law Act. In my view the court should be reluctant to find a real and substantial connection where the connection arises from a unilateral relocation accomplished without

consent, in violation of the regime governing relocations, and where there has been no delay or acquiescence to such a move.

[emphasis added]

- [33] I conclude that the circumstances of this case also do not meet all the requirements stipulated in s. 74(2)(b) of the FLA. The result is that this Court cannot make an order under Part 4 of that Act respecting guardianship of and parenting arrangements for the children.
- [34] Having decided that no jurisdiction under the FLA exists, it is not necessary to make a determination under s. 74(3) of that Act whether this Court should decline to make an order because "it is more appropriate for jurisdiction to be exercised outside British Columbia".

3.4 Jurisdiction under the Divorce Act

- [35] Sections 3 and 4 of the Divorce Act addresses jurisdiction if two divorce or corollary relief proceedings are started on different dates in two provinces. Generally speaking the province in which the proceeding is "first filed" will have "exclusive jurisdiction to hear and determine the matter" and the second proceeding is "deemed to have been discontinued". The mother's action in this Court was filed first in time and hence this Court would have exclusive jurisdiction.
- [36] However, the recent Divorce Act amendments now provide an exception to this general rule where non-consensual/unilateral interprovincial relocation of children has occurred. As noted earlier, s. 6.2 of the Divorce Act now provides:

Removal or retention of child of marriage

6.2 (1) If a child of the marriage is removed from or retained in a province contrary to sections 16.9 to 16.96 or provincial law, a court in the province in which the child was habitually resident that would have had jurisdiction under sections 3 to 5 immediately before the removal or retention has jurisdiction to hear and determine an application for a parenting order, unless the court is satisfied

- (a) that all persons who are entitled to object to the removal or retention have ultimately consented or acquiesced to the removal or retention;
- (b) that there has been undue delay in contesting the removal or retention by those persons; or
- (c) that a court in the province in which the child is present is better placed to hear and determine the application.

- [37] These provisions employ concepts similar to those in the FLA, i.e. "habitual residence" of the children, "consent or acquiescence" to the child's removal/retention, and "delay" in seeking the assistance of the courts. None of these terms are specifically defined in the Divorce Act, however their meaning at common law is much the same as the meaning ascribed by the courts to the words in the provincial statutes: in this case, the FLA. My

conclusions under the FLA regarding the children's habitual residence and the absence of consent, acquiescence and delay therefore apply equally to any determination made under s. 6.2(1) of the Divorce Act.

- [38] Section 6.2(1)(c) above could still permit this Court to assume jurisdiction over the children and to issue parenting orders under the Divorce Act if I am satisfied this Court is "better placed" to hear and determine such matters. No criteria for any such determination are specified in the Divorce Act, but presumably they would include much the same forum conveniens considerations that exist at common law or as provided in s. 11 of the CJPTA (see para. 37 of *A.K.S. v J.S.S.* above).
- [39] For the purposes of the "best interests of the children" analysis urged upon me, the mother stresses the financial security which she enjoys while living with her father and the advantage of considerable extended family assistance in Vancouver. The importance of available cultural immersion is greatly emphasised. All of this evidence will have to be adduced at trial and the necessary witnesses are all in Vancouver. She argues that adducing such evidence in a Calgary hearing will be inconvenient and involve considerable, avoidable expense.
- [40] The mother also submits that the children will be "at risk" in Calgary because of the father's current unemployment and his alleged inability to provide for the children, notwithstanding his recent leasing of a three-bedroom home to accommodate them. Counsel criticized the father's evidence of financial and other assistance from his own mother as unsubstantiated. He made no mention of the wrongful denial of the father's parenting rights and the critical opportunity for him to bond with his infant child. Similarly, no mention was made of the social science exploring the positive child development benefits of early attachment to two involved parents. Nor was there any discussion about the ready availability of videoconference testimony, one of the significant technical improvements to our rather outdated judicial system arising from Covid-19.
- [41] As noted earlier however, it is not my role on this application to retroactively approve or disapprove the relocation from Calgary to Vancouver or to determine which location would best serve the interests of the children. Lest she despair, I would point the mother to cases where the Court initially ordered the return of the abducted child to their habitual residence location for a court hearing on the merits and thereafter held in favour of the desired relocation: see for example *Pepin v McCormack*, 2014 BCSC 2230.
- [42] For the moment, suffice it to say that s. 6.2 of the Divorce Act now also reflects an implicit assumption that it is in the best interests of the child for the merits of any proposed relocation to be determined by the Court located in the children's place of "habitual residence", here, Calgary. And I am not satisfied that this Court is "better placed" than the Alberta Court of Queen's Bench in Calgary to decide the merits of the mother's wish to relocate.

[43] I also note that one of the other issues to be litigated between the parties is the division of family property. The children's maternal grandfather, who loaned some money to the couple to buy the Calgary house, went on title as a co-owner to secure his loan, and who is now purporting to claim a full 50% interest in the property as a whole, initiated proceedings against the father in the Alberta Court in January 2022 seeking "partition and sale" of the property. The Court subsequently ordered the sale of the property (to be completed in the near future) and the net proceeds will be paid into the Alberta Court pending further order (or agreement between the interested parties, one of whom is of course the mother). In short, her "family" is already embroiled in litigation in Alberta and it makes sense for the Alberta Court to decide all the issues in dispute, including relocation.

[44] Another factor in a forum conveniens analysis is "the fair and efficient working of the Canadian legal system as a whole" (see s. 11(2)(f) of the CJPTA). From a policy and administration of justice point of view, our courts should not endorse relocations effected by child abduction unless most exceptional circumstances exist. This factor very strongly militates in favor of the Alberta Court.

4. CONCLUSION

[45] For the reasons set out above this Court:

1. Declares that the children of the marriage were habitually resident in Alberta immediately before their wrongful relocation to British Columbia on September 3, 2021 and subsequent wrongful retention in this province;
2. Declares that the Court of Queen's Bench of Alberta is the most appropriate forum in which the family law proceedings between the parties should be heard and determined, including orders for parenting time, for any application related to any future relocation of the children from that province to British Columbia, and/or for division of family property and debt;
3. Declares that, pursuant to s. 74(2) of the Family Law Act, this Court has no jurisdiction to make any orders under Part 4 of that Act;
4. Declines to exercise any other jurisdiction it might have, whether pursuant to the Family Law Act, the Divorce Act or grounded in the doctrine of parens patriae, and stays the family law proceeding before this Court;
5. Orders that, within 60 days of the date of this order and at her own expense, the claimant shall return the children of the marriage to Calgary, Alberta, and either deliver them into the custody of the respondent or retain them in her own custody in that city on such parenting terms as the parties may agree or which the Court of Queen's Bench of Alberta may order, and
6. Awards the costs of this application and these proceedings generally to the respondent.

"Kent. J"

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Prepared on 29 October 2026 · Esheria