
CANADA / JUDGMENT

S.G.B. v S.K.B.

2020 BCSC 1402

COURT

Supreme Court of British Columbia

DECIDED

24 August 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1402 S.G.B. v. S.K.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.G.B. v. S.K.B.,

2020 BCSC 1402

Date: 20200824

Docket: E200962

Registry: Vancouver

Between:

S.G.B.

Claimant

And

S.K.B.

Respondent

Before: The Honourable Madam Justice Wilkinson

Oral Reasons for Judgment

Counsel for the Claimant, appearing by teleconference:

I. Phillips

Counsel for the Respondent, appearing by teleconference:

T.P. Harding

Place and Date of Hearing:

Vancouver, BC

July 30, 2020

Place and Date of Judgment:

Vancouver, BC

August 24, 2020

Introduction

- [1] As these are oral reasons, I make the usual reservation that if a transcript of these reasons is ordered I may edit them but the overall substance and result will not change.
- [2] This case raises issues regarding the interpretation and application of s. 74 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] in the circumstances of a child being removed from British Columbia to Saskatchewan by the respondent. She has filed a prior family claim in that province.
- [3] The claimant filed a Notice of Family Claim in this Court on June 4, 2020. The respondent applies within that claim for an order dismissing the claimant's family law case on the grounds that the Supreme Court of British Columbia does not have jurisdiction over this matter or, alternatively, submits this court should decline jurisdiction.

Background

- [4] The parties began cohabiting in a marriage-like relationship in June 2012 in Whistler, British Columbia. The claimant is now 53 and the respondent 36 years old. They moved to Squamish, British Columbia in the summer of 2013. They have a son, born in August 2013, and at the date of the hearing he was therefore almost seven years old. In 2015, the parties purchased a house in Squamish with the assistance of the claimant's parents.
- [5] Early on in their son's life the respondent was concerned he had behavioural issues, and observed physical reactions which she connected with certain environmental and food exposures. She took their son to their family doctor when symptoms arose. While he was still an infant she noticed he was very anxious, he developed eczema while she was breastfeeding and her family doctor advised to cut out certain foods since he may have food allergies. When he started eating other food she noticed additional reactions and cut out more foods. Their family doctor apparently advised that children often have temporary food sensitivities and that their son should outgrow them.

- [6] The respondent refers to a cold or flu which their son contracted in November 2016 which was then followed by bizarre and extreme behaviours, as well as exasperated the previous reactions (eczema) and behavioural issues. The next month he caught another cold and she says the same behaviours reappeared.
- [7] In 2017, the respondent states their son started to develop more extreme obsessive compulsive behaviours, and acting out violently for no apparent reason.
- [8] By the summer he seemed to improve. In the autumn and winter she states his behaviours and symptoms worsened. Again, in the summer of 2018 the respondent says their son's behaviours and symptoms got better.
- [9] The claimant discounts these observations and disagrees that their son suffers from any abnormal behavioural or physical issues. In essence, he is of the opinion that any behavioural issues are as a result of the respondent's parenting techniques. He admits to giving his son some of the foods the respondent has tried to eliminate from their son's diet as treats, since he does not believe his son has any negative reactions to those foods.
- [10] During this time the respondent sought medical advice from their family doctor. That doctor apparently mentioned in 2016 the possibility of a diagnosis of Pediatric Acute-onset Neuropsychiatric Syndrome ("PANS"). He referred the family to a pediatrician who, in January 2017, did not rule out PANS, but did not make such a diagnosis, saying it was a possibility.
- [11] In 2018, the respondent became concerned that mould in the family home in Squamish could be one of the issues negatively affecting their son. The claimant took some remedial action in the home, but not to the satisfaction of the respondent.
- [12] The family went to the respondent's parents for Christmas 2018 in Cupar, Saskatchewan. The respondent states that during those three weeks their son had almost none of the symptoms associated with PANS. The claimant agrees their son was well behaved and happy and attributes that to the Christmas festivities and gathering, not PANS or any environmental or food consumption issues.
- [13] In February 2019, the respondent took their son to Cupar, Saskatchewan. She told the claimant that she was concerned for their son's health and that Squamish was not a healthy environment for him. There is some disagreement about what was said at the time of departure on or about February 8, but on February 14, 2019 the respondent wrote to the claimant saying the visit to Saskatchewan was to see how their son reacted to living in a drier climate and give it maybe two months to see what changes take place. She noted that she understood to detox from mould symptoms takes approximately three to six months for adults, and that she wanted to speak to the claimant about this.

- [14] The claimant wrote back on February 19 saying, "this move you have made" with their son reopens bigger questions on what is in their son's best interests. He then questioned the basis for her concerns. Then he wrote "you can stay out there as long as you want" "it's up to you but your denial of some basic facts on this mold issue, the house and the complete righteousness of your opinions pushes an increasingly bigger risk I simply won't be here when you come back, the longer you stay."
- [15] He wrote on February 21, 2019 to follow up saying "perhaps time and separation will mutually put things in better perspective about what is really important I'm not keen on giving up ".
- [16] In March 2019, the respondent expressed interest in moving to somewhere in Alberta or British Columbia which had a drier climate than Squamish. The claimant states while he contemplated the move he felt it would result in a drastic upheaval of the family and would be based on the respondent's subjective and misguided views on mould and its perceived effects on their son's health.
- [17] Also in March, the respondent enrolled their son in school on Cupar. She did not consult the claimant before making this decision but he did agree afterward that their son needed to be in school since he had already missed 18 weeks since leaving Squamish.
- [18] The claimant visited the respondent and their son in Cupar in April 2019. At that time the respondent verbally told the claimant that she wanted to separate. He states he said he would not settle for anything less than equal custody of their son. He left Cupar, and the respondent and their son, taking the family car with him.
- [19] In May 2019, the claimant states he concluded that the relationship was doomed. He consulted a lawyer, as did the respondent. The claimant briefly began dating someone else.
- [20] Also during that time, the respondent was consulting medical professionals about their son's symptoms. She consulted a pediatrician, a psychiatrist referred by the pediatrician, and an allergist. She also took their son to a children's play psychologist to help him with his anxieties and dealing with the school structure.
- [21] On May 28, 2019, the claimant wrote to the respondent, "formally requesting, in writing, that my son " be returned to his Squamish home by July 1, 2019.
- [22] Unbeknownst to the claimant at the time, the respondent then filed a petition in the Saskatchewan Court of Queen's Bench, Family Law Division on June 5, 2019 seeking child custody, access and family maintenance orders.
- [23] In June 2019, the parties arranged for the claimant to visit with their son in Regina. The respondent was concerned about allowing the claimant to spend time alone with their son. Later in June, they exchanged text messages about possibly finding a home in Alberta.

- [24] Then, in August 2019, the claimant says he changed his mind about moving the family from Squamish and wrote to the respondent asking her to bring their son back home, saying they can work on a "well thought out plan moving forward, a financially responsible plan that works for everybody or you can continue to stay out there and hold-out and insist your opinions are the only ones that matter, in which case I'll be forced to exercise my only remaining option, and you know what that is."
- [25] Later, in August, the claimant travelled to Cupar to see his son on his birthday. The parties discussed in what grade to enroll their son for the new school year, and obtaining more medical testing.
- [26] The claimant visited Cupar again in October 2019. During that visit he says she again told him she wanted to separate.
- [27] In December 2019, after reviewing the referral consultation results, their son was diagnosed by the Saskatchewan pediatrician with having PANS.
- [28] The claimant says he and the respondent were regularly communicating during the last months of 2019 about their son, his schooling in Cupar, and his upcoming visit at Christmas. During the visit he says the respondent became distant by the end of it.
- [29] In January 2020, their son was also seen by a functional medical doctor. A referral for allergy testing was completed in February 2020 indicating some allergies, but not the three foods tested or moulds.
- [30] In February 2020, the claimant says the respondent again said she wanted to separate. He says he wanted to know when their son would return to Squamish since the medical assessments were completed. He found a PANS clinic in Vancouver if their son required a PANS specialist.
- [31] On February 24, 2020, the respondent wrote to the claimant, saying this was not the original plan but since their son had settled in Cupar now, they should maintain that arrangement and he would have flexible visits with their son. The claimant responded saying he has given enough extensions of time to return to British Columbia: "I gave you legal notice last spring of my request to have him return to live within reasonable access," giving the respondent one week to come up with a better plan or he would take legal action.
- [32] The respondent obtained full-time employment near Cupar at the end of February 2020.
- [33] The claimant states that the parties did not separate until February 26, 2020. The claimant states that on March 4, 2020 he was served with the respondent's Saskatchewan petition, previously filed in June 2019. However, his Answer and Counter-Petition, filed March 20, 2020 in Saskatchewan, sets out that he was served on February 26, 2020. It also erroneously stated that there was a pending proceeding filed in British Columbia. He did not file his British Columbia Notice of Family Claim until June 4, 2020.

[34] The respondent takes the position that the parties separated on February 13, 2019 when she left Squamish with their son.

Jurisdiction under the Family Law Act

[35] Part 4, division 7 of the FLA addresses extraprovincial matters respecting parenting arrangements. Section 73 of the FLA sets out the purposes of the division:

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.

[36] In cases where an order regarding a child may be made in more than one jurisdiction, the FLA provides as follows:

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.

[37] In this case, since the child was not physically present in British Columbia neither when the British Columbia Notice of Claim was filed nor when the respondent's application was filed, jurisdiction under s. 74(2)(b) and (c) is not available.

[38] "Habitually resident" is defined in s. 72(2) and qualified under s. 72(3) of the FLA:

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

(a) with his or her parents,

(b) if the parents are living separate and apart, with one parent

(i) under an agreement,

(ii) with the implied consent of the other parent, or

(iii) under an order of a court or tribunal, or

(c) with a person other than a parent on a permanent basis for a significant period of time.

(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.

Were the parties living separate and apart?

[39] The claimant submits that the parties did not live separate and apart until February 26, 2020, and at that time the respondent did not have the consent or implied consent of the claimant for their son to habitually reside with her. His position is that s. 72(2)(a) of the FLA applies here and that the child's habitual residence is Squamish, British Columbia. He also says for the purposes of s. 72(3), he could not have brought an order for the return of the child under the FLA until the parties lived separate and apart. Therefore, any "delay" pursuant to that section is minimal due to the very recent date of separation and the impact of COVID-19 on the court processes.

- [40] The respondent submits that the parties lived separate and apart as of February 13, 2019, or at least at some date much earlier than February 26, 2020, and that the claimant consented expressly or impliedly to the child's habitual residence changing to Cupar, Saskatchewan.
- [41] The phrase "living separate and apart" has a long history in Canada as having a liberal interpretation. It is not uncommon for parties who physically reside together to be considered to be living separate and apart for Divorce Act and family law purposes. While the parties did not refer me to any case law on the issue, the law is settled on the factors to be considered when applying the unique facts of any given case to deciding whether parties are living separate and apart: the absence of sexual relations (although not determinative), a clear statement by one of the parties of their desire to end the relationship, physical separation, the parties no longer presenting as a couple, no actual reconciliation: see *Oswell v. Oswell* (1990), 74 O.R. (2d) 15, aff'd 12 O.R. (3d) 95, *Eisener v. Baker*, 2007 BCSC 83, and *Velisek v. Velisek*, 2000 BCSC 557.
- [42] It was made clear to the claimant by April 2019 that the respondent wanted to separate from him. They clearly disagreed about their son's health issues, which was the impetus for the respondent to take him to Saskatchewan. They continue to disagree on that front, with the claimant not accepting the pediatrician's diagnosis. The claimant let the respondent know at that time what custodial arrangements he wanted and a month later was convinced the relationship was doomed. He started dating another person. The respondent filed a family law claim in June 2019, again indicating her position that the parties were separated, although she did not serve those proceedings on the claimant until February or early March 2020.
- [43] They have lived physically apart since February 2019.
- [44] There may have been sexual relations as recent as August 2019 according to the claimant, but the respondent never made an explicit statement that she thought they had reconciled or that she had changed her mind.
- [45] In my opinion, applying the principles of the decisions cited above, there was no mutual commitment to a marriage-like relationship after April 2019. I find that by April 2019, if not earlier, the parents of the child were living separate and apart.

Habitual residence of the child

- [46] That being the case, if the child habitually resided in Saskatchewan under an agreement or with the implied consent of the other parent, the child would be considered habitually resident in Saskatchewan as of July 2020 when the claimant and respondent filed their respective applications in this case. Alternatively, if the child was removed by the respondent without the claimant's consent, but the claimant acquiesced or delayed in applying for an order, did that removal change the habitual residence of the child from British Columbia to Saskatchewan?

- [47] A person's habitual or, similarly, ordinary residence, is a finding that depends on the facts of a particular case. The FLA uses the expression "habitual residence" but the case law makes it clear that "habitual" and "ordinary" residence are interchangeable terms. I was referred to the decision in *S.R.L. v. K.J.T.*, 2014 BCSC 597 at para. 30 for guiding principles governing the determination of ordinary residence:
- a) Preponderance of time spent at a residence is not determinative: *Thomson v. Minister of National Revenue*, [1946] S.C.R. 209 at 224;
 - b) A person may be ordinarily resident without being actually resident: *Hardy v. Hardy*, [1969] 2 O.R. 875 (H.C.J.) at 876;
 - c) It is where a person regularly, normally or customarily lives his or her customary mode of life as opposed to a special, occasional, or casual residence: *Thomson* at 224, 231, *Hardy* at 876-877;
 - d) It is where a person intends to make a home for an indefinite period; an intention to reside there permanently is not required: *MacPherson v. MacPherson* (1976), 70 D.L.R. (3d) 564 (Ont. C.A.) at 570; *Mahar v. Mahar* (1987), 10 R.F.L. (3d) 276, [1987] B.C.J. No. 925 (N.B.Q.B.).
- [48] The respondent did not take their child to Saskatchewan on a family visit or vacation. There was a clear indicated purpose understood and consented to by the claimant in February 2019 that the respondent was taking their son for an indefinite time in order to see how he reacted to a change in environment and seek medical diagnoses and assistance. At first the respondent estimated it would be a few months but her own communication was that it could be six months or more just for detox if he in fact had a reaction to mould. However, there was the outstanding issue, as the respondent saw it, of dealing with their son's other symptoms.
- [49] It is clear to me that, in February 2019, the claimant consented to their son residing with the respondent in Saskatchewan. He knew it was not going to be just a visit, however, it was communicated to him at first that it would be for a specific purpose and not necessarily permanent. Later, as the parties later discussed, a permanent move to a different, drier location was considered.
- [50] As of July 2020, their son had been physically present with the respondent in Saskatchewan for 17 months, from the age of 5 ½ to 7 years old now. He lives there with his mother and grandparents. He sees medical practitioners and goes to school there. The claimant goes to Saskatchewan for visits. The child has developed local friendships and has the support of the intervention and support program within the local school system. The respondent's family is very involved and spend time with the child.
- [51] On the facts of this case and applying the guiding principals set out above I find that the child of the relationship was habitually resident in Saskatchewan at the time of the application. I do not find that the child was habitually residing with the respondent at that time with the agreement or implied consent of the claimant. His consent for removal was

provided to the extent the child and respondent would come back to British Columbia. In May 2019, the claimant expressly asked the respondent to "return" their son by July 1, 2019. The claimant consulted legal counsel as early as May 2019. In August 2019 he threatened to take legal action if they did not return. Even though the parties were in regular communication during this time and the claimant went to visit his son, I do not consider this to be implied consent to a change in habitual residence.

- [52] However, by the time this application was filed, I do find that the delay by the claimant since August 2019 in bringing his application under the FLA had the effect of changing the child's habitual residence, despite the lack of consent, pursuant to the definition of habitual residence in s. 72(3) of the FLA.
- [53] That would mean that British Columbia is not the habitual residence of the child at the time of the application and this Court's jurisdiction to make an order regarding the child under the FLA is not available.

Appropriateness of jurisdiction to be exercised outside of British Columbia

- [54] If I am incorrect on the finding of the child's habitual residence, and the child is habitually resident in British Columbia, I would decline to exercise my jurisdiction pursuant to s. 74(3) of the FLA, which is in essence a forum non conveniens provision. This requires the court to consider the factors set out in s. 11 of the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28: *Shortridge-Tsuchiya v. Tsuchiya*, 2010 BCCA 61 at paras. 42, 60.
- [55] The child has a real and substantial connection to Saskatchewan at this time developed over the last 17 months. He lives there with the respondent and his maternal grandparents, attends school there, has a set of medical and other service and support providers. He has developed local friendships and is engaging with his mother's family, friends and their children. His mother has full time employment there and has the support of her family.
- [56] The respondent has already filed a family law petition in Saskatchewan and the claimant has filed his response and counter-petition. There is no concern regarding the Saskatchewan court system's ability to adequately decide the claims. The respondent has not made a property claim within her own petition but the respondent's British Columbia claim does include a property claim. The family property appears to be located in British Columbia. The claimant submits therefore that the only jurisdiction to resolve the property issues between the parties is British Columbia, which would necessitate two claims which should be avoided. I agree that multiplicity of proceedings is to be avoided. I am informed that the property issues are minimal in that the parties' family debts and assets may very well wipe each other out. I also expect that the parties could amend their Saskatchewan pleadings to deal with the property issues pursuant to British Columbia law.
- [57] In considering the purposes set out in s. 73 of the FLA, I exercise my discretion to decline jurisdiction pursuant to s. 74(3) of the FLA. I find that Saskatchewan is a more appropriate jurisdiction for the resolution of the guardianship, parenting arrangements and child

contact issues involving the child of the relationship. It is also an appropriate forum for the remainder of the claims between the parties on a balance of convenience. Subject to counsel submissions on whether I should provide a stay of proceedings for the property division proceedings pending resolution of the Saskatchewan pleadings issue, I dismiss the claimant's Notice of Claim in this matter.

[58] Counsel, is there anything arising on the property claims issue?

[Submissions]

[59] THE COURT: I dismiss the claimant's notice of claim, subject to the property claims made in that notice, which I stay pending further submissions and possible agreement of the parties.

[60] MS. MILLER: Thank you, My Lady.

[61] THE COURT: All right, and submissions on costs?

[Submissions]

[62] THE COURT: Well, the respondent is successful on her application. I would normally be awarding her costs on Scale B, but I am prepared to hold off, pending resolution of the property claims issue and further agreement of the parties, although I would be inclined to order costs at Scale B.

[63] MS. MILLER: Thank you, My Lady.

[64] MR. HARDING: Thank you, My Lady.

[65] THE COURT: Thank you, counsel.

[66] THE CLERK: So costs on Scale B then for the applicant?

[67] THE COURT: Not yet. It is pending resolution of the entire claim.

[68] THE CLERK: Okay, so I'll just leave it adjourned generally.

[69] THE COURT: Yes, we can do that.

[70] THE CLERK: Okay.

[71] THE COURT: Yes.

[72] THE CLERK: And then for the other application regarding child and parenting time, that is adjourned generally then, My Lady?

[Submissions]

[73] THE COURT: All right. Well, just to make it clear, I will dismiss those claims.

[74] THE CLERK: Thank you, My Lady.

[75] MS. MILLER: So the claim regarding the 211 report and the parenting time are dismissed?

[76] THE COURT: Yes. No costs on those claims.

[77] MS. MILLER: Thank you.

[78] THE COURT: All right.

[79] THE CLERK: Thank you, My Lady.

[80] THE COURT: Thank you, counsel.

[81] MR. HARDING: Thank you, My Lady.

[82] MS. MILLER: Thank you, My Lady.

"Wilkinson J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/14/2020BCSC1402.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/s-g-b-v-s-k-b-2020>

Prepared on 25 October 2026 · Esheria