

CANADA / JUDGMENT

Stajcer v. Evans

2025 BCSC 2676

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 2676 Stajcer v. Evans

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stajcer v. Evans,

2025 BCSC 2676

Date: 20251208

Docket: E232950

Registry: Vancouver

Between:

Ryan Norman Stajcer

Claimant

And

Naomi Malena Evans also known as Naomi Malena Stajcer

Respondent

Before: The Honourable Justice J. Hughes

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

K. Perrick

Counsel for the Respondent:

M. Huberman

Place and Dates of Hearing:

Vancouver, B.C.

September 3, 2025,

October 10 and 24, 2025

Place and Date of Judgment:

Vancouver, B.C.

December 8, 2025

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Overview

- [1] These reasons address competing jurisdictional applications in this family action.
- [2] The claimant seeks an order that this Court has jurisdiction over the parties in the matters raised in the notice of family claim. He also seeks other relief regarding guardianship, parenting and related matters.
- [3] The respondent seeks orders that:
 - a) The notice of family claim filed October 31, 2023 be struck out under the Supreme Court Family Rules, B.C. Reg. 169/2009 [SCFR], Rule 18-2(1)(a) on the basis that this Court does not have jurisdiction over the matters in issue;
 - b) alternatively, that the notice of family claim be dismissed or stayed under SCFR Rule 18-2(1)(b) on the basis that the Court should decline jurisdiction as Arizona is the forum *conveniens* to hear and determine the issues raised; and
 - c) A declaration that the children are not habitually resident in British Columbia.

- [4] At the outset of the hearing, I directed that the jurisdictional matters would proceed first, and that the other matters would be addressed subsequently depending on the outcome of the jurisdictional application.

Facts

- [5] The parties were married in June 2003 in Oahu, Hawaii. Both are Canadian citizens. The parties have four children together: M.M.S., who is 18; K.M.S., who is 16; and twins K.J.S. and A.A.S., who are 12.
- [6] During the relationship the parties lived with the children in Surrey, British Columbia. The claimant is a builder/developer and was the breadwinner for the family. The respondent was a stay-at-home mother and a homemaker. The claimant and the respondent are also shareholders in a company through which the claimant operates his business.
- [7] In October 2021, the parties separated. The respondent says they separated because of difficulties in the relationship, including substance abuse by the claimant.
- [8] The parties agreed that the respondent and the children would move to Arizona. The purpose of this move was for the respondent and her children to be closer to the respondent's twin sister and family. The respondent left Canada first with the children and transported her vehicle and personal effects to Arizona.
- [9] The claimant joined them a few weeks later in November 2021, but maintains that his primary residence was in Canada.
- [10] The respondent did not know how long she would stay in Arizona at the time. She and the children initially stayed in a rented Airbnb from October 2021 until January 2022.
- [11] In December of 2021, the claimant and the respondent jointly signed a one-year lease for a home in Arizona for the period of January 15, 2022, through January 15, 2023. The respondent and the children lived in the rental home until May 2023. When the claimant visited the respondent and the children in Arizona, the respondent would move out of the rental home and the claimant would exercise his parenting time with the children at that property. The respondent and the children had to move out of the rental property when the owners of the property sold it in May of 2023.
- [12] In January of 2022, the claimant and the respondent began weekly marriage ministry meetings through their church in Arizona with a couple referred to them by the respondent's sister. However, those efforts proved unsuccessful.
- [13] In April of 2022, the claimant and the respondent extended their visitors' visas in the U.S. for six months. They had the assistance of immigration counsel in doing so. The claimant participated in this process and communicated directly with counsel.

- [14] The parties also own investment properties in California, including a \$1,000,000 investment in a timeshare company in San Diego, and a \$75,000 investment into apartment buildings in Stockton, California. In light of this, the parties made inquiries about obtaining E-2 investor visas to further extend their stay in the U.S. In furtherance of these efforts to obtain E-2 visas, the claimant consulted with two different U.S. immigration counsel.
- [15] From August 2022 through August 2024, all four children attended public school in Peoria, Arizona. From August 2024 onwards, M.S. has attended an online high-school program and K.S. has been homeschooled.
- [16] In October 2022, the respondent and the children returned to British Columbia for a three-week visit. The claimant picked them up at the Bellingham airport on arrival, and drove them back to the Bellingham airport for their flight back to Arizona. The respondent testified that during this visit she learned that the claimant had a girlfriend in California, and that this was a very "chaotic and stressful" time during which the claimant attempted to convince her to move to California with the children, where he could live close to his girlfriend.
- [17] The respondent and the children returned to British Columbia for a second visit over the holidays in December 2022. When it was time to return to Arizona on December 30, 2022, the claimant again drove the respondent and the children to the airport in Bellingham.
- [18] The claimant testified that he understood that the respondent and the children were only going back to Arizona for a "vacation" when they left BC on December 30, 2022. He says he was surprised when the respondent booked a last-minute ticket and thought she and the children would return to BC in time for school. More specifically, his evidence was that:

On December 28th, 2022, she said that she wanted to take the children back to see her sister, in the City of Peoria, Arizona, USA, and I agreed, among other reasons, because there was still another week before the kids were to return from Christmas break to school.

(a) The children were attending [name of school], in Surrey School District, a semi-private school.

(c) I had no idea of her plans not to come back from Arizona, USA.

- [19] I find the claimant's evidence on this point difficult to accept. First and tellingly, the claimant's evidence completely ignores the fact that the respondent and the children had been living in Arizona since October of 2021. Moreover, to the extent that the claimant intended to suggest that the children were to return to their school in White Rock in January 2023, this evidence is untenable in light of the preponderance of the evidence, which shows that other than visiting White Rock in October of 2022, they had been residing in Arizona since October of 2021. The respondent's uncontradicted evidence is that the children had not attended their school in White Rock since March 2020 when it closed due to the COVID-19 pandemic and that they were homeschooled by her prior to starting school in Arizona.

[20] Further, on December 30, 2022, the parties entered into a form of parenting and child support agreement, which was reduced to writing in the form of an email that was printed out and signed by the parties. The agreement was titled "Plans for [the respondent] and [the claimant for the] next three months" (the "December 2022 Agreement") and included the following terms:

When [the claimant] is in Arizona [the respondent] moves out and goes to her sisters to save us money.

Holidays [the claimant] gets to take the kids on the long weekend in January and February and spring break wherever he wants within the usa [sic] California Arizona whatever.

...

In march they will . . . make new plans for end of march

In the meantime, [the claimant] is not okay with [the respondent] and the kids leaving Canada as he feels they should stay here to support him as he tries to build his company back up to where it's successful again. Or at least until the american companies start supporting as earlier agreed.

...

If [the respondent] decides to stay in AZ from today till spring break then she agrees to putting the rental in her name and all utilities.

She will also agree to [the claimant] sending her \$8,000 US dollars to her bank of america account by the first of every month to pay all of these invoices and live off.

[21] Both parties signed the agreement. The respondent said she did so in the car on the way to the airport. Each of the above-noted terms was followed by a checkmark and the respondent's initials, presumably indicating her agreement with the exception of the point regarding holidays. That point was followed by "discuss w/ lawyer", as was the point regarding the claimant not being "okay" with her and the children returning to Arizona. It is also material in my view that the agreement contained the following statement "If [the claimant's investments] do not start making money then everyone has agreed to moving back to Canada at spring break", but those words were struck through and initialled by the claimant.

[22] In light of this, I do not accept the claimant's assertion that he "had no idea of [the respondent's] plans not to come back from Arizona". His evidence on this point is proven false by the December 2022 Agreement. Rather, I prefer the respondent's evidence to the claimant's and find that the respondent left British Columbia for Arizona in October 2021 with the claimant's actual or implicit consent and that he has been aware that they were intending to stay in Arizona for an extended period of time thereafter--not a vacation.

- [23] The respondent started working in Arizona in June 2023. Sometime that summer, in July or August, the claimant stopped providing financial support to the respondent and the children. The claimant stopped paying their accommodation expenses and closed the parties' joint bank account and stopped paying balances on the credit card that the respondent was using.
- [24] In September 2023, the claimant was arrested in Arizona and charged with driving under the influence. He subsequently pleaded guilty to those charges.
- [25] The claimant filed the notice of family claim in this action on October 31, 2023. The respondent was not served until November 17, 2023. In the intervening period the respondent commenced proceedings in the Superior Court of Arizona, filing a petition for Dissolution of Non-Covenant Marriage With Minor Children on November 9, 2023.
- [26] The claimant took no further steps in this action until he filed a notice of intention to proceed in February 2025. Rather, the parties litigated their family law issues in Arizona with both of them participating in the ongoing Arizona proceedings. The parties were represented by counsel, a judge was assigned and they participated extensively in those proceedings.
- [27] On November 28, 2023, the claimant brought a motion to dismiss the Arizona proceedings on the basis that the court lacked personal jurisdiction because he lived in Canada. That motion was dismissed on January 3, 2024. The claimant's Arizona counsel withdrew in December 2023, but he obtained new counsel that same month.
- [28] On January 8, 2024, the Arizona court made interim orders regarding parenting and support. Both parties were represented by counsel and tendered evidence, including by viva voce testimony at the hearing. The claimant participated in the hearing despite not having filed a response in the Arizona proceedings. In the course of the hearing the Arizona court considered evidence, including testimony, and made the following findings:
- a) Arizona was the children's home state on the date the temporary orders motion was filed or was the children's home state within six months before the filing of the temporary order's motion; and
 - b) That no international law concerning the wrongful abduction or removal of the children applied.
- [29] At the January 8, 2024 Arizona court hearing, the claimant requested a long-distance parenting schedule. He did not request the children be returned to British Columbia. The Arizona court ordered that the claimant and the respondent have joint legal decision-making authority for the children and put the following long distance parenting plan in place:
- a) The respondent will be the children's primary residential parent and the children will reside with her;

- b) Effective January 8, 2024, the claimant would have parenting time on a set schedule:
 - i. Fall break and spring break--the claimant to have parenting time from the day after the children were released from school to the day before school resumed;
 - ii. Winter break--the claimant to have parenting time for half the break; the first half in even years, and the second half in odd years; and
 - iii. Summer break--the claimant to have parenting time two weeks after school releases for summer until one week prior to the school resuming, with the respondent having parenting time for the rest of the summer; and
- c) The respondent was to allow the claimant reasonable parenting time when he travelled to Arizona, with the claimant to inform the respondent within 14 days in advance.

[30] The Arizona court also made a non-removal order as follows:

Relocation: Neither [the respondent] nor [the claimant] shall relocate the residence of the children outside of the state of Arizona or to a distance greater than 100 miles from the current residential locations without compliance with A.R.S. § 25-408. Any findings that a party has failed to comply may result in sanctions against that party pursuant to the same statute.

[31] With respect to child support, the Arizona Court ordered that the claimant pay the respondent child support of \$1,601 per month by income withholding order. The respondent was also granted judgment against the claimant for additional child support in the amount of \$12,516 as past support for the three-year period prior to the filing of the Arizona action.

[32] With respect to spousal support, the Arizona Court found that an order for temporary spousal support was warranted and ordered that the claimant pay the respondent spousal maintenance of \$2,200 per month. Taken together with the child support order, the claimant was ordered to pay the respondent \$3,809 per month.

[33] Finally, in light of his guilty plea on the driving while under the influence charges and his acknowledgment that alcohol was involved, the claimant was ordered to participate in Soberlink monitoring.

[34] The claimant exercised parenting time in California, Arizona and British Columbia. With respect to his parenting time in California, he testified:

I travel back and forth, between Canada and the U.S.A. legally, regularly, as "a visitor" to see my kids and to exercise block parenting times, including holidays, long weekends, spring breaks and entire summers.

Fortunately, I have the use of a close friend's house, in San Diego, on the beach, and the respondent "allows" me to have parenting time, there, in San Diego, California State, at my friend's house.

- [35] On February 6, 2024, both parties attended a parenting conference with a conciliator in the Arizona action. At that conference, the claimant sought to have the children relocate to either Surrey or San Diego, California, so that he could focus on his career, and support the family and be a part of the children's lives.
- [36] In August of 2024, the claimant was sentenced in Arizona for the September 2023 driving under the influence charge.
- [37] In October 2024, the claimant filed a response in the Arizona proceedings. Notably he did not take the position that the children should be returned to British Columbia. Rather, he requested orders, inter alia, that spousal maintenance and child support order be awarded in accordance with the Arizona Spousal Maintenance and Child Support Guidelines, and that orders of legal decision-making and parenting time be made in accordance with the children's best interests.
- [38] Also in October 2024, the claimant applied to modify the January 8, 2024 Arizona order. That application was denied.
- [39] In November 2024, a Stipulated Order Appointing a Business Valuation Expert was made to value the parties' community and business interests in certain companies and other business assets.
- [40] Over the course of 2025, the Arizona Court has made various additional orders:
- a) On January 13, 2025, the Arizona Court ordered that the claimant pay the respondent \$3,800 in attorney's fees;
 - b) On July 28, 2025, the Arizona Court ordered:
 - i. production of financial documentation in response to the respondent's motion to compel disclosure and for sanctions for non-disclosure related to the claimant's failure to comply with the Arizona Court's order to provide financial disclosure to court-appointed business valuator; and
 - ii. sale of the family home in Surrey, British Columbia.
- [41] The respondent also brought motions in Arizona proceedings seeking to compel the claimant's compliance with orders made regarding division of family property, including the sale of a boat located in San Diego, California.
- [42] In the summer of 2025, the children spent approximately six weeks with the claimant in San Diego. The claimant has also persisted in his efforts to convince the respondent to relocate from Arizona to California with the children. The respondent has indicated that she may consider moving to California.

- [43] Finally, and as reflected in the factual findings I have made above, I find the respondent's evidence to be more consistent with the documentary evidence and the preponderance of the probabilities than that of the claimant's. Her affidavit evidence is measured, detailed and corroborated by independent documentary evidence.
- [44] To the contrary, the claimant's evidence was vague and frequently lacked, or omitted entirely, significant detail on material issues to the point where I found it to be misleading when considered in light of the documentary evidence. In other instances, the claimant's evidence amounted to little more than bare assertions. The claimant often only addressed key points or attempted to explain, unpersuasively for the most part, conduct on his part that did not align with his position and response to evidence adduced by the respondent. The claimant's evidence about cooperating with the respondent in the children's move to Arizona in October 2021 and his signing a one-year lease in December 2021 is demonstrative.
- [45] The claimant's evidence was also often inconsistent, both internally and with the available documentary evidence. By way of example:
- a) His evidence about the date that the respondent returned to Arizona was internally inconsistent--in his Affidavit #2, he testified that they left on December 28, 2022, but that date is irreconcilable with the December 2022 Agreement being signed by the parties on December 30, 2022, which I accept happened when the claimant was driving the respondent and the children to the airport in Bellingham, Washington, for their return flight.
 - b) His evidence that the respondent said "she was going on vacation and never came back with the kids" is patently inconsistent with the preponderance of the evidence, including the claimant's own evidence;
 - c) The claimant failed to mention the efforts he made to assist the respondent and the children to extend their visitors' visas and attempts to obtain E-2 investor visas until after this issue was raised in the respondent's affidavits, together with corroborative email correspondence; and
 - d) The claimant testified that he expected the children to return to school in BC in January 2023, but did not mention that they had been living in Arizona with the respondent since October 2021 and had been homeschooled prior to that, and thus had not attended their school in BC since March 2020.
- [46] Considering the claimant's evidence as a whole, including what I find to be significant omissions therein, and weighing it against the preponderance of the evidence including the documentary evidence, I am left with the impression that the claimant's affidavit evidence intentionally and materially misrepresents the circumstances surrounding the respondent and the children's initial move to Arizona in October 2021, his involvement in that process, and the time he has spent in Arizona and California over the past four years.

[47] Accordingly, where the claimant and the respondent's affidavits conflict, I prefer the respondent's evidence. Most importantly, I do not accept the claimant's evidence that the respondent and the children moved to Arizona in October 2021 and remained there thereafter, without his knowledge or consent.

Analysis

[48] With the exception of two visits to British Columbia in October and December 2022, the respondent and the children have resided in Arizona since October 2021. The Arizona Court has assumed jurisdiction and made various orders in the proceedings before it.

[49] Nonetheless, the claimant asserts that this Court has jurisdiction and ought to exercise it. The analysis in this respect is two-fold.

- a) First, the court determines if it has territorial competence over the dispute. The burden of establishing territorial competence is on the party asserting the court has jurisdiction--here, the claimant: *Gill v. Kaur*, 2022 BCSC 2088 at para. 110.
- b) Second, if territorial competence is found, then the court must consider whether it ought to decline jurisdiction in favour of another more appropriate forum: *Family Law Act*, S.B.C. 2011, c. 25 [FLA], s. 74(3). The burden in this respect rests on the party asserting the other forum is more appropriate: *W.C.S.B. v. H.N.R.*, 2025 BCSC 1529 at para. 159.

[50] To establish territorial competence, a court must find that the ground establishing its jurisdiction is made out: *Dunmore* at para. 34. The grounds for establishing territorial competence are set out in s. 74 of the FLA, which says that where an order respecting guardianship, parenting arrangements or other contact with a child may be made--which applies where an order respecting guardianship, parenting arrangements or contact with a child may be made in more than one jurisdiction; that is 74(1).

[51] Section 74(2) of the FLA provides that a court may make an order respecting guardianship, parenting arrangements or contact with a child only if one of the three conditions therein are met:

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

- (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.

[52] The claimant asserts that the court has jurisdiction under s. 74(2)(a) or (b). He does not rely on s. 74(2)(c).

[53] The term "when the application is filed" in s. 74(2)(a) and (b) refers to when the document that commences the claim for guardianship, parenting arrangements or contact is filed: B.C. v. D.E., 2023 BCCA 251 at para. 77; W.C.S.B. at para. 44.

[54] In the present case, the notice of family claim commenced the relevant claims and accordingly its filing date--October 31, 2023--is the prescribed time for establishing habitual residence under 74(2)(a) and physical presence under s. 74(2)(b)(i). The claimant provides no authority in support of his position that December 29 or 28, 2022 is the prescribed date under s. 74(2)(a) and (b), and I reject it.

[55] The requirements of s. 74(2)(b)(i) through (vi) are conjunctive; E.G.U. v. A.M.E.S., 2021 BCSC 996 at para. 13.

[56] The claimant accepts that the children were not physically present in BC on October 31, 2023 when the notice of family claim was filed. Accordingly, s. 74(2)(b)(i) is not met, and jurisdiction cannot be established under s. 74(2)(b).

[57] This leaves s. 74(2)(a) of the FLA as the only remaining basis for this Court to have jurisdiction in the matter. The pertinent question is, thus, whether the children were habitually resident in BC on October 31, 2023.

Were the children habitually resident in British Columbia?

[58] The term "habitually resident" is defined in s. 72(2) of the FLA:

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

- (a) with the child's parents,

- (b) if the parents are living separate and apart, with one parent
 - (i) under an agreement,
 - (ii) with the implied consent of the other parent, or
 - (iii) under an order of a court or tribunal, or
 - (c) with a person other than a parent on a permanent basis for a significant period of time.
 - (3) The removal or withholding of a child without the consent of a guardian does not affect the child's habitual residence unless the guardian from whom the child is being removed or withheld acquiesces or delays in applying for an order of a court or an extraprovincial tribunal.
- [59] The combined effect of ss. 72(2) and 74 of the FLA is that habitual residence is determined in reference to the most recent time when both of two conditions were met, namely: (a) the children "resided" in one of the three circumstances enumerated in s. 72(2); and (b) they had not been removed or withheld without the consent, acquiescence or undue delay of all guardians: *Lukas v. Lemos*, 2025 BCSC 1658 at para. 49. If a child has been wrongfully removed and retained prior to the filing of the application, it is generally their residence before the wrongful removal or retention that is determinative of jurisdiction: *Dunmore* at para. 43.
- [60] Further, and as the Supreme Court of Canada instructs in *Dunmore*, a child "resides" where they are at home: *Dunmore* at para. 62. The focus of the analysis is on the factual connections between the child and the jurisdiction in question, including their use of social services, linguistic, cultural, educational and social ties and the presence of the family. Courts may also consider the circumstances surrounding any movements to and from the jurisdiction: *Dunmore* at para. 69.
- [61] The parties were living separate and apart as of October 31, 2023, and the children have lived with the respondent since the parties separated. Accordingly, s. 72(2)(b) applies.
- [62] As I understand his position, the claimant asserts that the children were habitually resident in BC under s. 72(b)(i) as of December 29, 2022, because that was the most recent time when the children were living with the respondent with his agreement. In the claimant's submission, the respondent wrongfully removed the children to Arizona the following day, December 30, 2022, such that it is their residence prior to that date that is relevant for the habitual residency analysis.
- [63] I do not find this submission persuasive. First, as set out above, the relevant date is October 31, 2023, not December 29, 2022. The claimant's position as to the relevant date is unsupported in law and appears contrived to support his assertion that the children were wrongfully removed the following day, so as to minimize or negate the weight of their connections to Arizona thereafter, in reliance on s. 72(3) of the FLA.

- [64] Considering s. 72(2)(b) in light of the facts at hand, the place where the children most recently resided with one parent--the respondent--was Arizona. This is the case under each of s-ss. (i), (ii) and (iii) as they were living in Arizona with the respondent:
- a) with the claimant's implied consent from October 21, 2021 to December 30, 2022;
 - b) under an agreement--the December 2022 Agreement--from December 30 to the end of March 2023;
 - c) continued to live with the respondent in Arizona with the claimant's implied consent from March 2023 until January 2024; and
 - d) from January 8, 2024 onwards, they were living in Arizona with the respondent subject to the Arizona Court's non-removal order.
- [65] Consent and acquiescence are related terms: to consent is to agree to something, while to acquiesce is to agree tacitly, silently, or passively. In this respect, acquiescence implies unstated consent: Gill at para. 22, citing *Katsigiannis v. Kottick-Katsigiannis*, 55 O.R. (3d) 456, 2001 CanLII 24075 (O.N.C.A.) at para. 47. Accordingly, acquiescence involves subjective consent determined by words and conduct, including silence, which establishes the acceptance of, or acquiescence in, a child's removal or retention. To prove acquiescence, there must be clear and cogent evidence of some conduct on the part of the left-behind parent that is inconsistent with the summary return of the child to their place of habitual residence: Gill at para. 23.
- [66] I find that the claimant impliedly consented or acquiesced in the respondent and the children moving to Arizona in October 2021 and in their remaining there thereafter. In my view, the following conduct on the part of the claimant provides the necessary clear and cogent evidence of "some conduct" on his part that is inconsistent with him seeking a summary return of the children to British Columbia:
- a) in December 2021, he cosigned a lease for rental accommodations for the children for the period January 2022 through January 2023. His reasons for doing so--because he thought that a long-term lease was cheaper and he wanted stability for the children and was attempting to reconcile with the respondent--do not negate his consent to them living in Arizona that is implicit in his conduct in signing this lease;
 - b) his voluntary payment of financial support to the respondent and the children in the U.S. until August 2023, including by payment of \$8,000 into the respondent's American bank account;
 - c) his efforts to facilitate the respondent and the children's travel to and from Arizona on multiple occasions, including by driving the respondent and the children to and from the airport in Bellingham, Washington, to return to Arizona in connection with their visits in October and December of 2022;

- d) working with immigration counsel to extend the parties' initial visitors' visas and attempt to attain E-2 visas; and
 - e) his retention of multiple different counsel and participation in the proceedings before the Arizona Court.
- [67] While I accept that the parties attempted to reconcile in the early days of their separation--e.g. from October 2021 through late 2022--however, that fact does not negate the implicit consent to the respondent and the children living in Arizona while attempts at reconciliation were ongoing. Indeed, the parties pursued marriage counselling in the U.S. during this timeframe.
- [68] Moreover, the claimant expressly consented to the children returning to Arizona in December of 2022 and to them staying there at least until the end of March 2023 per the December 2022 Agreement. Notably in this respect, that portion of the December 2022 Agreement which contemplated the respondent and the children returning to BC at the end of spring break was struck through and initialled by the claimant.
- [69] Finally, and for clarity though implicit in my findings above, I am not persuaded that the respondent wrongfully removed the children to Arizona on December 30, 2022. The respondent and the children had been living with the respondent in Arizona with the claimant's implied consent since October 2021. The claimant then expressly consented to them living in Arizona from December 2022 to at least March 2023 pursuant to the December 2022 Agreement.
- [70] Importantly, the claimant testified that on the advice of counsel, he did not pursue his application under the Hague Convention, which is the means of address afforded to parents who assert their children have been wrongfully removed from their country of habitual residence or retained in another jurisdiction. Rather, as noted above, the claimant sought a "long-distance" parenting schedule at the initial hearing that resulted in the Arizona Court making the January 8, 2024 interim orders. Then in October 2024, the claimant only sought to modify those orders to the extent of having "exclusive decision-making in relation to the children's education" and to have parenting time in Arizona, San Diego or Canada.
- [71] The first indication that the claimant was seeking the children's return to British Columbia was not until he filed this application on April 4, 2025. By that point the children have been living in Arizona for three-and-a-half years and the Arizona Court had made interim parenting orders and, importantly, the non-removal order in favour of Arizona. The claimant's lengthy delay in applying for return of the children amounts to acquiescence and implicit consent to their habitually resident in Arizona: *D.L. v. M.Y.*, 2019 BCSC 881 at paras. 63-64.
- [72] Nor did the claimant pursue this action in a timely way. As indicated above, the action was filed on October 30, 2023, but the claimant took no further steps until the notice of intention to proceed was filed in February 2025. This was over a year after the Arizona Court made

interim parenting time, child support and spousal support orders, and after the claimant failed to obtain a variation of those orders. No explanation was provided for why he did not proceed with these proceedings or why he did not apply in the Arizona action to seek relocation of the children to British Columbia.

[73] I therefore find that the children's habitual residence is Arizona under s. 72(2)(b) of the FLA. The children have been living with the respondent in Arizona with the express agreement or implied consent of the claimant since October 2021.

[74] This finding is, in my view, consistent with Dunmore because the preponderance of the evidence establishes that the children were "at home" in Arizona as of October 31, 2023. The children's time in Arizona was not transitory or vacationing; to the contrary, it was their visits to British Columbia in October and December 2022 that were in the nature of a vacation. In my view, the children being at home in Arizona is demonstrated by the following:

- a) They had lived there with the respondent since October 2021, for the most part in stable rental accommodation;
- b) The children have attended school in Arizona since August 2022, initially all four in person and now two in person and one through an online program and one being homeschooled;
- c) The children have a close relationship with their aunt--the respondent's twin sister--and cousins in Arizona, and the respondent's parents travel to Arizona to visit their grandchildren;
- d) The children have been participating in sports, camps, youth groups and other activities through their church in Arizona: K. is playing competitive football and baseball; K. and A. compete in soccer; and M. is working out at the gym and hiking;
- e) The children have made friends in Arizona and spend time with them regularly and frequently;
- f) The children are involved in a supportive church community;
- g) At least one of the children has had medical care in Arizona; and
- h) The complainant has exercised at least some of his parenting time in Arizona.

[75] I accept that the respondent and the children have Canadian citizenship, however, this is but one factor and is not determinative: Dunmore at para. 72. I also accept that they have family ties to British Columbia. However, the balance of the claimant's evidence as to the factors he asserts show the children were "at home" in British Columbia was vague and devoid of detail on material points, uncorroborated, and basically amounted to assertion of past ties to British Columbia, the majority of which I find have been overtaken by their ties to and lives in Arizona.

- [76] In the result, I conclude the children were not habitually resident in BC when the notice of family claim was filed on October 31, 2023. Rather, they were "at home" and thus habitually resident in Arizona on that date. The Court therefore does not have jurisdiction under s. 74(2) of the FLA to determine the issues raised in the notice of family claim.

No basis to resort to parens patriae jurisdiction

- [77] The claimant argues that even if the court lacks territorial competence under s. 74 of the FLA, it ought to nonetheless exercise its parens patriae jurisdiction. The claimant's submission in this respect amounts to little more than a bare assertion, is unpersuasive and unsupported in law.
- [78] The claimant relies on *Habib v. Amin*, 2014 ONSC 5330, and *Dovigi v. Razi*, 2012 ONCA 361 in support of his position. Neither of those decisions are binding on this Court, and in any event, both are distinguishable on their facts. Moreover, the Court of Appeal in *Dovigi* overturned the trial judge, finding no gap in the legislation that would warrant recourse to the parens patriae jurisdiction. While the Ontario Court of Appeal recognized the possibility of exercising such jurisdiction, it did not do so on the facts before it, nor did it identify the circumstances in which recourse to the parens patriae jurisdiction would be appropriate.
- [79] The claimant has not persuaded me that the present circumstances warrant an exercise of parens patriae jurisdiction. The claimant accepts by way of his reliance on *Habib* at para. 29 that the parens patriae power is reserved for cases in which there is a legislative gap and "is not exercised to modify existing statutory schemes". That is precisely what I find he is attempting to do here as he has not identified any gap in the FLA, yet nonetheless seeks to have the court exercise its parens patriae jurisdiction to modify the result derived from the application of ss. 72 and 74 of the FLA.
- [80] The claimant provides no authority in which the parens patriae jurisdiction has been exercised in the circumstances similar to the case at bar, particularly in absence of a legislative gap. In my view, doing so would be particularly inappropriate where I have found that this Court lacks territorial competence and the Arizona court has assumed and is exercising its jurisdiction and is required to make decisions based on the best interests of the children.

The Court should decline to exercise jurisdiction

- [81] My conclusion that this Court does not have jurisdiction renders it unnecessary to consider whether the Court ought to decline to exercise jurisdiction in this matter. Nonetheless, even if this Court did have jurisdiction, I would decline to exercise it because Arizona is a more appropriate forum.
- [82] Section 74(3) of the FLA contemplates that a court may decline to make an order if the court considers it is more appropriate for a jurisdiction to be exercised outside British Columbia. The factors relevant to the forum analysis are set out in s. 11 of the Court Jurisdiction and

Proceedings Transfer Act, S.B.C. 2003, c. 28 [CJPTA]: A.I.P. v. K.B., 2022 BCSC 54 at para. 52. Section 11(2) of that Act provides that in deciding whether it or a foreign court is the more appropriate forum in which to hear a proceeding, the Court must consider the relevant circumstances of 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.

[83] I have considered the factors under the CJPTA and find that the desirability of avoiding a multiplicity of proceedings and the desirability of avoiding conflicting decisions in different courts are of considerable significance in the present case.

[84] The Arizona court has already asserted jurisdiction and made a multitude of orders, including orders finding the children to be resident in Arizona. If the Court were now to assume jurisdiction on the basis that the children were habitually resident in British Columbia, such an order would directly conflict with the order of the Arizona Court and thus also fail to provide for the recognition and enforcement of that order.

[85] The Arizona Court has also made interim orders regarding custody and parenting time and more recently orders regarding property division, including for the sale of the family home in British Columbia. If this Court were to exercise its jurisdiction to make orders under Part 4 of the FLA, this would create a serious risk of conflicting decisions. Additionally:

- a) there is no evidence of any issues with respect to enforcement of an eventual judgment of the Arizona Court in Canada;
- b) both parties have participated extensively in the Arizona proceedings to date; and
- c) given the respondent and the children's strong connection to Arizona, the majority of the witnesses and evidence is likely located in Arizona and it will be less disruptive for the children to have the proceedings continue to be conducted in Arizona.

[86] I am also mindful of the principles of comity that animate Div. 7 of the FLA and the CJPTA. Matters related to parenting time, child support and property division have already been adjudicated by the Arizona Court. The purpose of the FLA's provisions regarding extra-provincial matters respecting parenting arrangements includes avoiding the making of orders regarding the same children in more than one jurisdiction and providing for the recognition and enforcement of extra-provincial orders: FLA s. 73(b) and (d).

- [87] Finally, the record before me--specifically the affidavit of Arizona law provided by the respondent--establishes that the Arizona Court is required to consider the best interests of the children in making orders regarding the children in the Arizona proceedings. I am satisfied that should this Court decline jurisdiction in favour of Arizona, the children's best interests will be considered in any further orders made by that court. The purpose of Div. 7 of the FLA, as set out s. 73(a) of the FLA, is best fulfilled if jurisdiction is declined in favour of the Arizona Court.
- [88] On the whole, considering the relevant factors, Arizona is (in my view) clearly the more appropriate forum to determine matters related to the children's guardianship, parenting, contact, and child support and spousal support.

Conclusion

- [89] Where a court determines that it does not have jurisdiction over a proceeding, the proper order is for the proceeding to be dismissed: *Aslanimehr v. Hashemi*, 2022 BCCA 248 at para. 49. I therefore order that the within action is dismissed. Consequently, paragraphs 1 and 5(a) of the respondent's application filed May 26, 2025 are granted and the claimant's application filed April 4, 2025 is dismissed.
- [90] As the successful party, the respondent is entitled to costs of both applications. The respondent sought leave to address costs following issuance of this decision. Accordingly, the parties are granted leave to submit a request to appear back before me to speak to costs, which request is to be made within 30 days.

"Hughes J."

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