

CANADA / JUDGMENT

Y.Q. v. J.D.

2021 BCSC 943

COURT

Supreme Court of British Columbia

DECIDED

17 May 2021

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2021 BCSC 943 Y.Q. v. J.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Y.Q. v. J.D.,

2021 BCSC 943

Date: 20210517

Docket: E201247

Registry: Vancouver

Between:

Y.Q.

Claimant

And

J.D.

Respondent

Correction notice: The cover page, the case name header and paragraphs [6] and [19] of the judgment were corrected on May 28, 2021

Before: The Honourable Madam Justice Matthews

Reasons for Judgment

Counsel for J.D., Applicant on Jurisdiction Application:

C. Ke

Counsel for Y.Q., Respondent on Jurisdiction Application:

B. Lin

Place and Date of Hearing:

Vancouver, B.C.

April 29-30, 2021

Place and Date of Judgment:

Vancouver, B.C.

May 17, 2021

Overview

- [1] The respondent in this family law dispute applies for a stay of proceedings on jurisdictional grounds. He argues that the British Columbia Supreme Court does not have jurisdiction or should decline jurisdiction over the dispute in favour of China. The matters in issue are parenting, guardianship and contact (collectively "parenting") of the parties' four-year-old daughter, child support, spousal support and property division. The claimant submits the court has jurisdiction over all matters and should exercise it. However, she is indifferent as to whether Court should decline jurisdiction with regard to the parties' real property situated in China,
- [2] At the conclusion of the hearing, I advised the parties that I had decided that the Court had jurisdiction and should exercise it with regard to parenting and child support and I would give reasons to judgment to follow. I advised the parties that I was reserving my decision on the other jurisdictional issues. These reasons for judgment provide my reasons for my decision on jurisdiction with regard to parenting and child support and my decisions and reasons on jurisdiction with regard to the other issues.
- [3] I will refer to the parties by their initials. The claimant is Y.Q. The respondent is J.D. Their child is A.D.
- [4] For the reasons that follow, I conclude that the British Columbia Supreme Court has jurisdiction over all issues and should exercise jurisdiction over all issues. I dismiss the respondent's application.

Jurisdictional Facts

- [5] The parties have filed numerous affidavits; J.D. has filed four and Y.Q. has filed eight. Some facts are not in dispute but the parties dispute many facts and each alleges that the other is not credible. Obviously, it is challenging to determine the truth based on affidavit evidence that conflicts to such a significant extent. However, many disputed facts do not need to be determined for the purpose of this application and it is clear that the parties assert them in relation to issues that are yet to be determined in the litigation as it progresses in British Columbia or in China. Where I state facts without reference to competing evidence, it is

because they are not in dispute. Where facts are in dispute, I will state the competing evidence and my conclusion.

- [6] Both parties appended screenshots of text message conversations on WeChat, which is a popular messaging app in China. Ordinarily, the court must examine the authenticity and accuracy of such transcripts. However, in this case, both parties referred to the messages that they appended to their affidavits extensively and in a manner that demonstrated that they both accepted that they were communications between Y.Q. and J.D. or between J.D. and either of Y.Q.'s parents. The statements were translated from Chinese to English. Neither party raised an issue with the accuracy of the translations.
- [7] Y.Q. and J.D. met in the city of Chengdu in the province of Sichuan, China in approximately October 2013. Both lived in Chengdu for substantial periods of their lives prior to that time. They began a romantic relationship in Chengdu.
- [8] In 2009, J.D. became the registered owner of a property in the Chenghua District of Chengdu. He asserts that although he alone is on title of the Chenghua property, he owns the property with his parents and they live there. In 2012, Y.Q. became the registered owner of a property in the Wuhou District of Chengdu. Her parents live in the Wuhou property and she alleges that they provided the funds to purchase the property.
- [9] Y.Q. and J.D. both worked for Sichuan Airlines; Y.Q. was a flight attendant and J.D. was a pilot. According to Y.Q., J.D. proposed that they move to Canada, where he would obtain a position as a pilot for Air Canada. In order to proceed with this plan, Y.Q. applied to study in the British Columbia. Her status as a former foreign student provided the basis for their application to immigrate. J.D. disputes that they developed a plan to immigrate at his instigation and asserts that it was Y.Q.'s idea and goal. I do not need to decide that issue.
- [10] In October 2015, Y.Q. and J.D. put a deposit on a condominium in Richmond, British Columbia. J.D. asserts that all of the funds for the property were provided by him from assets that he had prior to the relationship.
- [11] Y.Q. and J.D. were married on December 6, 2015 in Richmond, British Columbia. J.D. was still employed as a pilot for Sichuan Airlines. Y.Q. was no longer working for Sichuan Airlines. She was studying at Kwantlen Polytechnic University. The evidence is not disputed that from after that time, Y.Q. resided in British Columbia and J.D. resided with her during his twice-monthly flight layovers, which lasted three to four days at a time, and when he had vacation time.
- [12] The evidence does not disclose a common habitual residence during their marriage other than British Columbia between 2015 and 2019.

- [13] On June 4, 2016, the parties had a child, A.D. After her birth, Y.Q.'s mother visited from China and assisted with A.D.'s childcare. Y.Q.'s mother had a visitor's visa that required her to return to China twice a year. On most of those occasions, A.D. went with her. Sometimes Y.Q. also went. When in Richmond, J.D. participated in A.D.'s care including taking her to and from daycare.
- [14] In order that A.D. would be permitted to travel to and in China, Y.Q. and J.D. attended at the Chinese Consulate in Vancouver to obtain a Chinese travel document for A.D. a few months after she was born. J.D.'s counsel submits that they renounced A.D.'s Canadian citizenship and China accepted her as a citizen of that country. Y.Q., on the other hand, deposed that they did not do anything that affected her Canadian citizenship and that A.D. has a Canadian passport on which she travels. Y.Q. understands that despite having been born in Canada, A.D. is able to obtain a Chinese travel document because her parents are Chinese citizens. That document is valid until she is an adult, at which time the Chinese state will require her to choose her citizenship.
- [15] I make no findings about what the parties did at the Chinese Consulate in regards to A.D.'s citizenship because there is not enough evidence for me to do so. She was born in British Columbia and, with the exception of the couple of months a year that she went to China, she lived in British Columbia from the time she was born in 2016 until October 2019 when her father took her to China, as will be discussed below. She has a Chinese travel document.
- [16] In October 2016, the parties moved into the condominium on which they had placed a presale deposit. That condominium is located on Tomicki Avenue in Richmond. The property was registered in Y.Q.'s name.
- [17] The parties' marriage began to strain at some point in 2019. They differ on their date of separation. Y.Q. alleges they separated in June 2019. J.D. alleges that they separated in late 2019 or early 2020.
- [18] In October 2019, A.D. travelled with Y.Q.'s mother to Chengdu. J.D. piloted the aircraft on which they travelled. The parties agree that A.D. was to spend two months in Chengdu with Y.Q.'s mother and J.D. When A.D. left British Columbia in October 2019, she had a return ticket with a flight home on December 31, 2019.
- [19] The WeChat message strings include communications that shortly after A.D. arrived in Chengdu in October 2019, she was staying with Y.Q.'s mother. J.D. sent Y.Q. messages stating that A.D. was frequently crying and asking to go home. He also sent her audio clips of A.D. crying. In late October 2019, A.D. went from Y.Q.'s mother's house to the home that J.D. owns and in which his parents reside. I understand that J.D. was staying there also. A.D. subsequently developed pneumonia and was hospitalized. A.D. has not seen her maternal grandmother since December 2019.

- [20] Y.Q. and J.D. continued to experience difficulties in their marriage which were related to accusations by J.D. that Y.Q. had several affairs. Y.Q. denies that she had an affair. She deposed that she confessed to an affair because J.D. would not agree to move forward unless she confessed and so she made a false confession in order to repair the marriage.
- [21] Y.Q. deposed that J.D. set conditions for the continuation of their marriage, including that Y.Q. have J.D.'s name and a sentence he stipulated tattooed on her body and that Y.Q. have her vagina and ovaries surgically removed. The WeChat messages contain discussions between Y.Q. and J.D. pertaining to J.D.'s conditions on which they could reconcile. The messages do not contain statements from J.D. setting these conditions. However, they do include communications in which the basis on which they can move forward is discussed in conjunction with Y.Q. expressing concern about the size and location of tattoos (she objects to them being in a private place) and concerns that J.D. is asking her to harm herself. J.D. responds by saying that he needs to see sincerity so that they have a foundation to move on. The messages also include a conversation in which Y.Q. demanded to video chat with A.D. and J.D. responded that "[i]n principal it can be discussed. You said yester [sic] and today that you will have a plan for resolution, I am still waiting."
- [22] In a telephone call that Y.Q. recorded, she asserts that while discussing settlement, J.D. said
- If you look for a man, the man won't want you, you'll age very fast, because you wouldn't have any sexual functions. You can donate vagina too, ovaries can be donated too. You can be a normal person, everything you do would be to look after [A.D.] and then I will support the family because I should, you will take care of the home and child because you should. If you did this, the worse case scenario is that your whole family, no matter where you hid or how far you hide, very soon someone will know why you moved to there. Everywhere in the world. Ah, being in my profession is convenient this way, free flight tickets everywhere. You can go anywhere, I can find you.
- .
- Or you will never see [A.D.] again for the rest of your life. Won't contact, hide very well.
- Hide your name and abandon your husband and child, have surgery removal, and avoid further hazard, that's a plan too.
- [23] Unlike the WeChat messages, J.D. did not rely on this transcript. There is no basis on which to infer that he knew that Y.Q. was recording the call, that he accepts the transcription is accurate, or that the translation is accurate.

- [24] In WeChat messages in November 2019, Y.Q. asked J.D.: "So you will not allow me to have video chat with our child, is that right? So even if I go back to China right now, as long as we don't have an agreement you will not allow me to meet our child, is that right?" J.D. sent Y.Q. a video of A.D. and then said that "I will try my best to send you more videos and photos." In response to Y.Q. repeating "I want to meet my daughter", J.D. stated "[t]hen you should quickly and practically resolve this problem".
- [25] On November 22, 2019, J.D. spent several days in Richmond on a layover. During that time, he filed a charge against the Tomicki Avenue property under the Land (Spouse Protection) Act, R.S.B.C. 1996, c. 246. In his sworn declaration in support of that charge, he stated that he had been living in the Tomicki Avenue residence since October 26, 2016 and that he was still living there. He stated that the Tomicki Avenue residence was his residence. J.D. also took Y.Q. to a lawyer's office and presented her with an enduring power of attorney to sign. The power of attorney was to give J.D. the ability to make financial decisions for Y.Q. and deal with her property. Y.Q. did not sign the enduring power of attorney at that meeting. She deposed that she did not know what it was. She took it to a lawyer for review. Sometime in December 2019, she communicated to J.D. that she would not sign it.
- [26] For reasons that are not clear, the parties agreed that A.D.'s flight home would be rescheduled to December 6, 2019. However, they subsequently agreed to reschedule it to December 27, 2019 because A.D. had been ill with pneumonia and was not fully recovered in time to take the December 6 flight.
- [27] In late December 2019, Y.Q. and J.D. were no longer communicating frequently or civilly due to the breakdown in their relationship. Y.Q. attributes this to her refusal to sign the enduring power of attorney. Y.Q. deposed that her last communication with A.D. was on WeChat video in December 2019. On December 30, 2019, Y.Q. complained to J.D. that he had not brought A.D. back to British Columbia as agreed on December 27, 2019. She advised she adamantly disagreed with A.D. staying in China and complained that J.D. had not let her see their daughter. J.D. replied that it would be "impossible for you to bring my daughter abroad without my consent and permission". Y.Q. deposed that she has not had communication with her daughter since then. J.D. does not dispute that. As late as June 23, 2020, J.D. justified his refusal to provide parenting time to Y.Q. by reference to her infidelity and her subsequent behaviour towards him.
- [28] Based on the undisputed WeChat messages, I find that J.D. imposed conditions on Y.Q. for continuing their marriage that included making changes to her body by having tattoos. Y.Q. objected to the extent and location of the tattoos. I make no findings either way about the allegations that he required her to have her vagina and ovaries removed. But it is clear that J.D. put Y.Q.'s ability to have a future relationship with A.D. into the negotiations about their marriage and threatened her about A.D.

- [29] A.D. has a Chinese residence card demonstrating that she resides at the home of her paternal grandparents. It states that she came to that residence on May 11, 2020. Y.Q. asserts that in order to obtain such a card, a child born abroad must not be a citizen of another country. Y.Q. asserts that A.D. is a Canadian citizen. In addition, both parents must make declarations and provide information in support of the application. Y.Q. deposed that she did not. She submits that the card must have been obtained through false pretences. I accept that Y.Q. did not make a declaration in support of the card and conclude that J.D. obtained it by falsifying her declaration.
- [30] On May 19, 2020, J.D. filed a civil complaint against Y.Q. in the Chengdu Wuhou District People's Court. In the civil complaint, J.D. sought a divorce, an order that he raise A.D., an order that Y.Q. pay monthly alimony, division of Y.Q.'s Wuhou property, and divorce damages. J.D. provided the Wuhou property as the address for Y.Q., despite the fact that he knew that she did not live there.
- [31] J.D.'s conduct in obtaining a residence card for A.D. without Y.Q.'s participation and falsely declaring to the Chengdu Court that Y.Q. resides in Chengdu "gives rise to obvious concerns that he is not forthright with the Court and is willing to manipulate facts to his advantage": *Xi v. Zhang*, 2018 BCSC 2559 at para. 30.
- [32] On June 23, 2020, J.D. advised Y.Q.'s counsel that he had commenced the proceedings in the Chengdu Wuhou District People's Court. On July 6, 2020, Y.Q. commenced these proceedings.
- [33] J.D. provided evidence of the history of the Chengdu proceedings as well as a summary of Chinese law on the claims made in this proceeding and the Chengdu proceeding. The evidence is in the form of a letter written by his counsel in the Chengdu proceedings. While his lawyer acknowledges he is providing assistance to the court and may not be partisan in doing so, that acknowledgement is hard to square with his role as J.D.'s counsel. In British Columbia, evidence on a matter, in this case foreign law, is not adduced from a party's counsel. In addition, the letter includes double hearsay on some of the factual matters, including service of Y.Q. However, Y.Q. also relied on some of the statements of procedural facts and some of the statements of law and so I will consider this evidence to the extent that the principles of law are not contested.

Legal Framework

- [34] There are at least two elements distinct elements to a jurisdictional dispute: territorial competence and forum non conveniens. Territorial competence, or jurisdiction simpliciter, considers whether the court can hear the matter. Forum non conveniens considers whether the court should hear the matter, that is, whether the court should decline to exercise its territorial competence in favour of another forum that is "clearly more appropriate": *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 103. In some cases, choice of law is also considered.

[35] Generally speaking, territorial competence and forum non conveniens are governed in British Columbia by the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 [CJPTA]. However, the CJPTA expressly provides that it may be superseded by clear legislation to the contrary:

12 If there is a conflict or inconsistency between this Part and another Act of British Columbia or of Canada that expressly

- (a) confers jurisdiction or territorial competence on a court, or
- (b) denies jurisdiction or territorial competence to a court,

that other Act prevails.

[36] Whether another act supersedes the CJPTA with regard to either territorial competence or forum non conveniens must be addressed claim by claim under the applicable provisions of that act.

[37] Territorial competence under the CJPTA is set out in s. 3:

3 A court has territorial competence in a proceeding that is brought against a person only if

- (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,
- (b) during the course of the proceeding that person submits to the court's jurisdiction,
- (c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,
- (d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding, or
- (e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

[38] Section 10 expands on s. 3(e) by providing a non-exhaustive list of factors where a real and substantial connection is presumed to exist.

[39] The Divorce Act, R.S.C. 1985, c.3 (2nd Supp.) displaces s. 3 of the CJPTA with regard to territorial competence over parenting orders, child support, and spousal support: ss. 3(1), 4(1), and 6.2(1). Pursuant to s. 3(1) of the Divorce Act, the British Columbia Supreme Court has territorial competence over divorce proceedings where at least one of the spouses was habitually resident in British Columbia for at least one year immediately prior to the commencement of the proceeding. Section 4(1) provides that a court has jurisdiction over a corollary relief proceeding if s. 3(1) is met or if both spouses consent.

[40] The Family Law Act, S.B.C. 2011, c. 25 supersedes s. 3 of the CJPTA with regard territorial competence over parenting orders and property division: ss. 74 and 109. It does not displace the CJPTA with respect to child support or spousal support.

[41] Forum non conveniens is addressed in s. 11 of the CJPTA:

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.

[42] Neither the Divorce Act nor the Family Law Act displaces the CJPTA with regard to forum non conveniens for parenting orders, child support, or spousal support. Section 106(4) and (5) of the Family Law Act supersedes s. 11 of the CJPTA with regard to property division. The Divorce Act does not provide for property division.

[43] The claimant bears the initial burden of establishing that the court has territorial competence, based on the assumption that the facts pleaded are true. The respondent may contest the veracity of the pleaded facts with evidence. In response, the claimant is only required to show that there is a good arguable case that the facts that establish territorial competence can be proven: *Purple Echo Productions Inc. v. KCTS Television*, 2008 BCCA 85 at para. 34. Once this is established, the court is presumed to have territorial competence. Where territorial competence is presumed on the basis of a connecting factor in s. 10 of the CJPTA, the respondent may rebut the strong presumption of territorial competence by establishing facts that show that a real and substantial connection does not follow from the existence of that connecting factor: *Ewert v. Höegh Autoliners AS*, 2020 BCCA 181 at para. 16.

- [44] With regard to forum non conveniens, the party seeking to displace the initial choice of forum bears the burden of establishing that another forum is "clearly more appropriate": Van Breda at para. 103; JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd., 2015 BCCA 200 at para. 45.
- [45] Where claims include a divorce and other matters such as parenting, child support, and spousal support, the court must determine whether the governing legislation is the Divorce Act or the Family Law Act. Where the parties are married or were married, orders for parenting, child support, and spousal support are corollary orders under the Divorce Act. However, these types of orders can also be made under the Family Law Act if there are no "operational inconsistencies" between the acts: B.D.M. v. A.E.M., 2014 BCSC 453 at paras. 110, 113-115, citing M.M. v. C.J., 2014 BCSC 6; and Canadian Western Bank v. Alberta, 2007 SCC 22. Where there is conflict, the Divorce Act governs because of the doctrine of federal paramountcy.

Parenting

Applicable Legislative Regime

- [46] Section 6.2(1) of the Divorce Act addresses jurisdiction on parenting issues where the child is not in the province when the application is made:

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.
- [47] Section 16.1(1) provides that a court of competent jurisdiction may make an order providing for the exercise of parenting time or decision-making responsibility in respect of a child on application by either or both spouses. A court of competent jurisdiction, by virtue of s. 3(1) and s.4(1) of the Divorce Act, is the superior court in the province where at least one of the parties was habitually resident for at least a year before the action as commenced.

[48] In sum, the British Columbia Supreme Court has jurisdiction over parenting under the Divorce Act if either Y.Q. or J.D. was habitually resident in the province for a least a year before this action was commenced, A.D. was habitually resident in this province when she left the province, J.D. removed her without Y.Q.'s consent or acquiescence, and Y.Q. did not unreasonably delay in contesting the removal or retention.

[49] Section 74 of the Family Law Act addresses jurisdiction with respect to parenting under Part 4 of the 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.

[50] Habitual residence of a child is defined in s. 72(2) and (3) of the Family Law Act:

- (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.
- [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. On the latter issue, under s. 6.2(1) of the Divorce Act, the issue is whether she delayed in "contesting" her removal. Under s. 72(3) of the Family Law Act, the issue is whether Y.Q. delayed in seeking an order of the court. The parties did not provide any case law addressing whether there is a substantive difference between the two.
- [53] With regard to forum non conveniens, the regimes are ultimately identical. The Divorce Act does not address forum non conveniens, thus requiring consideration of the CJPTA, while s. 74(3) of the Family Law Act implicitly incorporates s. 11 of the CJPTA.
- [54] Both parties argued this case under the Family Law Act. I am satisfied that there is no operational difference between the regimes in this case and so will decide the parenting issues under the Family Law Act.

Territorial Competence

- [55] Subsection 74(2) of the Family Law Act stipulates that a court may make an order with respect to parenting if at least one of three conditions is met. In this case, the only condition that could apply is (a): A.D. was habitually resident in B.C. when the application was filed. A.D. was not physically in B.C. when the application was filed on September 29, 2020 so neither (b) nor (c) apply.
- [56] Because J.D. filed a jurisdictional response to the notice of family claim, no steps could be taken until the jurisdictional issues were addressed. As a result, both parties address delay on the basis that July 6, 2020 was the day that Y.Q. made an application pertaining to A.D.'s removal from Canada.
- [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].
- [59] The parties made submissions on the date of separation because s. 72(2)(b) provides for factors to consider to determine habitual residence when a child's parents are separated. However, it is not necessary for me to decide the date of separation since the question is where A.D. habitually resided at the time this action was commenced in July 2020 and there is not dispute that the parties were separated by that time.

- [60] It is clear that A.D. resided in British Columbia with Y.Q. from the time of her birth until October 2019 when she went to China with J.D. and her maternal grandmother. The issue is whether her place of habitual residence changed after that time and before Y.Q. filed this application. That requires determining whether she remained in China with Y.Q.'s consent, and if she did not, whether Y.Q. unreasonably delayed in commencing this action.
- [61] Although Y.Q. consented to A.D. going to China with her maternal grandmother and J.D., the evidence does not support a finding that she consented to A.D. staying there beyond December 31, 2019. A.D. left British Columbia with a return flight booked for December 31, 2019. Y.Q. initially agreed to an earlier flight home on December 6, 2019, and then agreed to a flight on December 27, 2019, but she never agreed to any extension beyond December 31, 2019. In January 2020, Y.Q. went to China to look for A.D. and J.D., but could not find them. She messaged J.D. to inform him that she was in Chengdu to look for A.D. He claims that he did not receive the message, but only received calls from a Richmond, B.C. number that he did not recognize. J.D. disputes that Y.Q. made this trip. I find, based on Y.Q.'s evidence, including messages from her to J.D. saying that she was in Chengdu looking for them, that she did go to China looking for A.D. when J.D. did not bring A.D. back to B.C. at the end of December 2019.
- [62] Y.Q. did not find J.D. and A.D. at J.D.'s Chenghua property or at the Wuhou property where Y.Q.'s parents live. J.D. deposed that he had taken A.D. to stay with friends in a more rural area because of the spread of COVID-19 in China at the time. I make no finding as to whether that is correct, but it is clear that he did not tell Y.Q. or her parents where he had taken A.D.
- [63] J.D. points to the fact that A.D. has a residence card demonstrating that she resides at the home of her paternal grandparents. For the reasons given above, I do not accept that it is evidence of A.D.'s habitual residence or that it speaks to whether she was residing in Chengdu with Y.Q.'s consent. I conclude that J.D. obtained it for jurisdictional purposes as he was planning to file his Chengdu proceedings.
- [64] There is no doubt that A.D. was removed from British Columbia beyond December 31, 2019 without Y.Q.'s consent.
- [65] The next issue is whether Y.Q. unreasonably delayed in commencing this action on July 6, 2020.
- [66] In *D.L. v. M.Y.*, 2019 BCSC 881 at para. 62, Madam Justice Sharma commented on s. 72(3) of the Family Law Act:

This provision prevents a child from being left in a sort of limbo, where the child has been physically present and settled in one jurisdiction for an extended period of time, yet their habitual residence remains in another jurisdiction with which they no longer have any significant connection. Such a situation would be wholly against the best interests of the child.

- [67] In that case, Sharma J. found that a 15 month delay was unreasonable and concluded that the parent applying for the return of the children had acquiesced to a change of residence of the children from China to British Columbia.
- [68] In this case, J.D. calculates the delay as over eight months, from October 2019 (when he took A.D. to China with Y.Q.'s consent) to July 6, 2020. He submits that Y.Q. only commenced this action in July 2020 because she learned that he had commenced his action in Chengdu in May 2020. In the Chengdu action, he advised the court that she resided at the Wuhou residence when she did not. The Chengdu People's Court is responsible for serving Y.Q. It is not clear whether Y.Q. learned of the Chengdu action before J.D. advised Y.Q.'s counsel of it in late June 2020.
- [69] I do not accept the submission that the delay was eight months. J.D. did not retain A.D. in China without Y.Q.'s permission until the end of December 2019. Y.Q. then travelled to Chengdu in January 2020 to find A.D. but could not. From March 2020 onwards, the COVID-19 pandemic severely curtailed international travel and closed the British Columbia courts for almost three months. Although urgent applications were permitted, applications pertaining to repatriating children were not considered urgent because those children could not be brought home: *Johansson v. Janssen*, 2020 BCSC 469 at para. 17.
- [70] In the meantime, through counsel, Y.Q. demanded video parenting time with A.D. On June 23, 2020, J.D. advised Y.Q.'s counsel that he had commenced the Chengdu proceedings. Y.Q. commenced these proceedings on July 6, 2020. That is also around the time that the British Columbia courts began the process of re-opening and hearing matters other than urgent matters.
- [71] I am of the view that in these circumstances, Y.Q. did what she could to obtain parenting time with A.D. Her actions were not unreasonable and do not amount to unreasonable delay or acquiescence to A.D.'s residence changing from British Columbia to China. Accordingly, this Court has territorial competence regarding parenting orders concerning A.D.

Forum Non Conveniens

- [72] Section 74(3) of the Family Law Act implicitly incorporates the factors set out in s. 11 of the CJPTA: *Shortridge-Tsuchiya v. Tsuchiya*, 2010 BCCA 61 at paras. 42, 60-61; *King v. Gillingham*, 2020 BCSC 1984 at paras. 21-22, 27. The list of factors in s. 11 is non-exhaustive; the court may also consider the purposes set out in s. 73 of the Family Law Act, including the best interests of the child:

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.

See Shortridge-Tsuchiya at para. 61; King at para. 21.

- [73] The best interests of A.D. must dominate this analysis. She is a young child. With the exception of the one to two months she spent in China each year, the first three plus years of A.D.'s life were spent in British Columbia with her mother, maternal grandmother, and her father (when he was in British Columbia on layovers and vacation). A.D. attended day care in British Columbia and developed relationships with other children there.
- [74] A.D. has been removed from two of the three people with whom she was most familiar, her mother and her maternal grandmother. The evidence is that in November and December of 2019 she was having emotional difficulties adjusting to staying in Chengdu with her father and paternal grandparents and was crying about wanting to go home, and wanting to take an airplane to see her mother. She also expressed distress about missing her friends from daycare. In my view, given her connection to British Columbia, a British Columbia court is in the best position to determine the parenting arrangements that are in her best interests.
- [75] Most significantly with regard to her best interests is that her father has used her as a negotiating chip in his dispute with Y.Q. I regard his commencement of proceedings in Chengdu regarding the parenting of A.D. to be part of this conduct. I consider that J.D. perpetrated family violence during these negotiations. While the family violence was not directed at A.D., it involves her as it included threats of alienating her from her mother and refusing to discuss A.D. and her mother having video chats until Y.Q. addresses a plan for resolution. I find that to be family violence which has the potential to affect A.D.: *Hokhold v. Gerbrandt*, 2014 BCSC 1875, aff'd 2015 BCCA 268, supp'l 2016 BCCA 159.
- [76] In order to facilitate this negotiating strategy, J.D. has kept A.D. in Chengdu without her mother's consent and without following appropriate procedures in accordance with the law of the jurisdiction of A.D.'s habitual residence. This conduct is contrary to the objective in s. 73(c) to discourage the abduction of children. J.D.'s negotiating tactics are certainly not in A.D.'s best interests.
- [77] With regard to comparative convenience under s. 11(2)(a) of the CJPTA, the pandemic has made participation of either party in proceedings in either country problematic. However, I note that J.D. played a significant role in that by unilaterally retaining A.D. in Chengdu when the spread of Covid-19 started in late 2019. In addition, once the pandemic no longer limits international travel, J.D., as a pilot who flies between Chengdu and Vancouver, will be much

less inconvenienced and incur much less expense to resolve parenting through a British Columbia Court than Y.Q. would in the Chengdu proceedings.

- [78] In this regard, I have not ignored J.D.'s evidence that he is no longer working as a pilot due to depression and Y.Q.'s submission that there is no actual evidence that he is not working. I cannot resolve that issue. However, the evidence is that he has access to free travel between Vancouver and Chengdu due to his status as an employee of Sichuan Airlines. He deposes that Y.Q. has that as a former employee and a family member of an employee. It is not clear whether their separation affects this if her access to free flights depend on her status as a family member of an employee. I infer her status is affected, because J.D. deposed that he would assist her to obtain free flights to Chengdu if she travels there to attend court. I do not consider it appropriate to consider Y.Q.'s convenience taking into account J.D.'s offer of assistance given his other conduct towards her and his lack of forthright conduct as it applies to these proceedings and the Chengdu proceedings.
- [79] With regard to the law that would be applied (s. 11(2)(b)), the limited evidence of Chinese law before me reveals a significant difference with British Columbian law. Although both jurisdictions consider the best interests of the child, China also considers fault and slightly favours the party not a fault on custody matters. This raises the possibility that Y.Q.'s alleged unfaithfulness could be considered by the Chinese court as a factor against her in making a parenting order. Such a situation would not be in A.D.'s best interest.
- [80] With regard to enforcement (s. 11(2)(e) and s. 73(d)), J.D.'s counsel in the Chengdu action deposed that a British Columbia judgment is unlikely to be enforced in China. Given the concerns I have expressed about the evidence regarding Chinese law, I cannot be confident that this is correct. However, even if it is correct, given the importance of A.D.'s circumstances and best interests, I give this factor less weight than her best interests.
- [81] Taking all of this into account, British Columbia is clearly the most appropriate jurisdiction with respect to determining the parenting issue. It is in A.D.'s best interest to have her parenting resolved where she has spent most of her life with her mother and her maternal grandmother. Moreover, declining to exercise jurisdiction in favour of China would effectively condone J.D.'s actions in retaining A.D. in China without her mother's consent and in obtaining a Chinese residence card for her. This goes against the stated purpose in s. 73(c) of discouraging child abduction.

Child Support and Spousal Support

Applicable Legislative Regime

[82] With regard to territorial competence on child support and spousal support, the parties' made their submissions based on the CJPTA applying because the Family Law Act does not provide for territorial competence. However, the Divorce Act does provide for territorial competence by a combination of ss. 3(1), 4(1), 15.1 and 15.2. In my view, the Divorce Act applies. If am on wrong on that, I will consider territorial competence under the CJPTA in the alternative.

Territorial Competence

- [83] By virtue of Y.Q.'s habitual residence in B.C. since 2015, this court has territorial competence over the child support and spousal support claims pursuant to ss. 3(1) and 4(1) of the Divorce Act.
- [84] In the alternative, the facts pleaded by Y.Q. and the evidence adduced in response establish that this Court has territorial competence under s. 3(d) and (e) of the CJPTA. With regard to s. 3(d), the evidence demonstrates that between October 2015 and October 2019, J.D. was back and forth between Chengdu and British Columbia as he carried out his duties as a pilot. In November 2019, J.D. completed a statutory declaration in which he deposed that the Tomicki Avenue property had been and continued to be his residence. I conclude that J.D. was resident in British Columbia from October 2015 until at least November 2019.
- [85] This proceeding was commenced on July 6, 2020. J.D. deposed that the last time he stayed in British Columbia was in November 2019, presumably when he made that statutory declaration. I also presume that he could not make that statutory declaration honestly if his November 2019 stay in British Columbia was not meant to be a part of a continuum of residence in British Columbia. Nevertheless, the evidence demonstrates that he has been living in China since then. COVID-19 was spreading in late 2019, although it was not yet a worldwide pandemic. It may be that the J.D. has not returned to British Columbia because of that. Alternatively, it may be that he has decided to change his residence to China, notwithstanding his statutory declaration. In the absence of evidence explaining this, J.D. has not demonstrated that he was not resident in British Columbia when this action was commenced.
- [86] With regard to s. 3(e), in *S.R.L. v. K.J.T.*, 2014 BCSC 597 at para. 38, Madam Justice Fenlon accepted that the residence of the spouse and the children for a significant period of time in Vancouver created a real and substantial connection with British Columbia. In this case, as already noted, the parties were married in British Columbia and A.D. was born in British Columbia. A.D. lived the vast majority of her life in British Columbia before J.D. unilaterally detained her in Chengdu. Y.Q. has lived in British Columbia since 2015 and still lives here. The common habitual residence of J.D. and Y.Q. during their marriage was in Richmond, British Columbia. These facts support the finding of a real and substantial connection with British Columbia for the purposes of child support.

- [87] The parties have property in British Columbia (i.e. the Tomicki Avenue property) that will be the subject of property division and so be relevant to spousal support. This circumstance provides a real and substantial connection with British Columbia for the purpose of spousal support: D.L. at para. 84, citing *Fastlicht v. Carmichael*, 2018 BCSC 37 at para. 92.
- [88] Accordingly, there is a strong presumption that a real and substantial connection with British Columbia exists with respect to both child support and spousal support. J.D. has not rebutted this strong presumption.
- [89] I conclude that this Court has territorial jurisdiction over child support and spousal support under both the Divorce Act and the CJPTA.

Forum Non Conveniens

- [90] With regard to child support, the s. 11 CJPTA factors clearly point to British Columbia as the most appropriate forum for same reasons I have stated above regarding parenting. In addition, child support should be determined in manner that dovetails with parenting.
- [91] With regard to spousal support, it is often determined in conjunction with property division. The s. 11 factors of convenience, avoiding multiplicity of proceedings, and avoiding conflicting decisions all favour spousal support being decided in the same jurisdiction as property division. As I will discuss below, this Court has jurisdiction over property division and is the more appropriate forum to decide it. Accordingly, this suggests that this Court should likewise exercise its jurisdiction over spousal support.
- [92] The property division issue aside, the application of the s. 11 factors to spousal support is similar as for parenting on the issues of convenience, avoiding conflicting decisions, application of the law, and enforceability. In addition, the fact that parenting and child support are to be decided in British Columbia adds to the convenience of deciding spousal support here and helps to avoid a multiplicity of proceedings.
- [93] I also consider the locus of the evidence that will be relevant to the determination of whether spousal support is payable and its quantum. Y.Q. left her work with Sichuan Airlines to study in British Columbia and it was on the basis of her being an international student that the parties relocated here. She has studied and worked part time in British Columbia. Although the parties dispute who was most keen on this plan, many facts relevant to spousal support have their geographical locus in British Columbia because all of Y.Q.'s education and work during their marriage has been in British Columbia. Accordingly, the fact that the evidence pertaining to J.D.'s income will be largely about his Chengdu-based employment does not tip the balance in favour of China; rather, the court deciding spousal support will have to consider evidence from both jurisdictions.
- [94] On balance, the evidence does not disclose that China is the clearly more appropriate forum to decide spousal support.

[95] I conclude that both child support and spousal support are more conveniently determined in British Columbia.

Property Division

Territorial Competence

[96] The Family Law Act provides a similar framework for determining territorial competence as the CJPTA, albeit with presumptive connecting factors specifically tailored to issues of property division:

Determining whether to act under this part.

106 (1) This section applies if an order respecting property division, respecting the same spouses, may be made in more than one jurisdiction.

- (2) Despite any other provision of this Part, the Supreme Court has authority to make an order under this Part only if one of the following conditions is met:
 - (a) a spouse has started another proceeding in the Supreme Court, to which a proceeding under this Part is a counterclaim;
 - (b) both spouses submit, either in an agreement or during the proceeding, to the Supreme Court's jurisdiction under this Part;
 - (c) either spouse is habitually resident in British Columbia at the time a proceeding under this Part is started;
 - (d) there is a real and substantial connection between British Columbia and the facts on which the proceeding under this Part is based.
 - (3) For the purpose of subsection 2(d), a real and substantial connection is presumed to exist if one of more of the following apply:
 - (a) a property that is the subject of the proceeding is located in British Columbia;
 - (b) the most recent common habitual residence of the spouses was within British Columbia;
 - (c) a notice of family claim with respect to the spouses has been issued under the Divorce Act (Canada) in British Columbia.
- [97] As noted above, Y.Q. was habitually resident in British Columbia when she commenced the proceeding. Accordingly, there is jurisdiction over property division pursuant to s. 106(2)(c) of the Family Law Act.

- [98] In addition, there is a presumptive real and substantial connection because all of the connecting factors in s. 106(3) exist. J.D. submits that the presumption under s. 106(3) is rebuttable where the evidence does not point to any real connection between the subject matter of the litigation and the forum or the connection is weak: *Shinitani v. Tang*, 2017 BCSC 1938 at para. 42 and *Carlson v. Phelan Estate*, 2016 BCSC 1256 at para. 96, citing *Van Breda* at paras. 95-97.
- [99] J.D.'s submissions focus on the presumption in s. 106(3)(a) regarding a property located in British Columbia. He submits that the presumption is rebutted because the bulk of the family assets are located in China. However, even if J.D. was able to rebut this presumption--and I am not convinced he has--he is unable to rebut the presumptions in s. 106(3)(b) and (c). I note that in both of the cases relied upon, (a) was the only connecting factor that applied. As such, even without (a), there are three different grounds on which to find that this Court has territorial competence (s. 106(2)(c), (3)(b), and (3)(c)) aside from s. 106(3)(a).

Forum Non Conveniens

- [100] Section 106(4) and (5) of the Family Law Act tailors the framework provided in the CJPTA for assessing forum non conveniens to the particular circumstances of property division:
- (4) Despite subsection (2), a court may decline to make an order under this Part if the court, having regard to the interests of the spouses and the ends of justice, considers that it is more appropriate for jurisdiction to be exercised outside British Columbia.
 - (5) In determining whether to decline jurisdiction under subsection (4), the court must consider all of the following:
 - (a) [Repealed 2014-9-15.]
 - (b) the relative convenience and expense for the spouses and their witnesses;
 - (c) if section 108 [choice of law rules] applies, the law to be applied to issues in the proceeding;
 - (d) the desirability of avoiding multiple proceedings or conflicting decisions in different courts or tribunals;
 - (e) the extent to which an order respecting property or debt
 - (i) made in another jurisdiction would be enforceable in British Columbia, and
 - (ii) made in British Columbia would be enforceable in another jurisdiction;
 - (f) the fair and efficient working of the Canadian legal system as a whole;
 - (g) any other circumstances the court considers relevant.

[101] Given that these factors are very similar to those set out in s. 11 of the CJPTA, I will not repeat my analysis of those factors in relation to parenting, child support, and spousal support. In summary, those factors do not suggest that China is the clearly more appropriate forum.

[102] Under the law to be applied factor in s. 106(5)(c), I must consider the specific provisions in s. 108 for determining what law applies to the division of property:

108 (1) In this section, "regime of community of property" means a system of law, including a regime of partnership of acquests, in which property owned or acquired and debt owing or acquired during the relationship between the spouses

- (a) are deemed to be owned or owing by both spouses, and
- (b) are divided, on separation of the spouses, as if both spouses equally owned the property or owed the debt,

but does not include a regime of separate property or a system of law under which a spouse's interest is deferred until or after the occurrence of an event that signifies the end of the relationship between the spouses.

- (2) If the Supreme Court takes jurisdiction under this Division, the Supreme Court must act in accordance with the rules set out in this section.
- (3) Subject to subsection (4), if spouses make an agreement respecting the division of property or debt, the substantive rights of the spouses in a proceeding under this Part are determined by the agreement.
- (4) The enforcement of an agreement under subsection (3) is subject to any restriction that the proper law of the relationship places on the ability of spouses to determine the division of property or debt by agreement.
- (5) Subject to subsection (3), if the spouses' first common habitual residence during the relationship between the spouses was in a jurisdiction in which a regime of community of property applies, property owned or acquired and debt owing or acquired during the relationship between the spouses that is property or debt to which the regime of community of property applies must be divided at the end of the relationship between the spouses according to that regime of community of property.
- (6) If neither subsection (3) nor (5) applies, the substantive rights of spouses in a proceeding under this Part must be determined according to the proper law of the relationship.

[103] Mr. Justice Hunter explained how to apply s. 108 in *Jiang v. Shi*, 2017 BCCA 276:

[31] Section 108 contains three choice of law rules that are to be applied in a hierarchical manner.

- [32] First, if the parties have made an agreement respecting the division of property, the substantive rights of the parties are governed by that agreement.
- [33] Second, if the parties have not made such an agreement, the judge must consider whether the spouses' "first common habitual residence" was in a jurisdiction where a regime of community of property applies. If so, property division must be made in accordance with that regime of community of property.
- [34] If neither of these considerations applies, the substantive rights of the parties must be determined according to the proper law of the relationship, which is defined in s. 107.
- [35] Section 107 then sets out its own set of rules for determining the proper law of the relationship. Once that has been determined, that law becomes one of the factors for consideration as to whether to decline jurisdiction, pursuant to s. 106(5)(c).
- [104] Section 107 provides:

The proper law of the relationship between the spouses for the purposes of section 108 [choice of law rules] is

- (a) the internal law of the jurisdiction in which the spouses had their most recent common habitual residence,
- (b) if the jurisdiction under paragraph (a) is outside Canada and is not the jurisdiction most closely associated with the relationship between the spouses, the internal law of the jurisdiction that is most closely associated with the relationship between the spouses, or . . .

- [105] Y.Q. and J.D. did not have an agreement regarding property division. On the evidence on this application, their first common habitual residence is British Columbia, where there is a regime of common property. British Columbia is also the jurisdiction in which the spouses had their most recent common habitual residence.
- [106] This factor favours British Columbia as the more appropriate forum. J.D. has not established that China is a clearly more appropriate forum. I determine that this Court should exercise jurisdiction over property division.

Conclusion

- [107] J.D.'s application is dismissed.
- [108] Y.Q. has an application for interim parenting time with A.D. pending. I am seized of that and I have directed that it be scheduled to be heard on May 25, 2021. Y.Q. also has an application to release the proceeds of the sale of the Tomicki Avenue property. I am not seized of that application, but I will hear it on May 25, 2021 if there is time to do both applications. If there is not enough time, I am not seized of it. I am not seized of any other matters.

[109] Y.Q. was successful on this application and so shall have her costs. However, if there are circumstances that the parties believe should result in a different conclusion, they have leave to seek a brief hearing before me so long as that request is made no later than 30 days from the date of this judgment.

"Matthews J."

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Prepared on 26 October 2026 · Esheria