CITATION: Atout v. Atout, 2016 ONSC 5487
COURT FILE NO.:FS-16-410859
DATE: 20160831

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
BILLYE VEGH ATOUT	)	
	)	
Applicant	)	*Alexandrea Grant*, for the Applicant
	)	
– and –	)	
	)	
SAID MEDHAT ATOUT	)	
	)	
Respondent	)	*Daniel W. Simard*, for the Respondent
	)	
	)	
	)	
	)	**HEARD:** August 30, 2016

F.L. MYERS J,

The Motions

[1] The applicant moves for interim custody of the parties' two children under the *Children's Law Reform Act*, R.S.O. 1990, c.C.12. The respondent asks the court to order the children to be sent to Arizona on the basis that this court does not have jurisdiction to hear the application.

[2] For the following reasons, the court orders that applicant shall have interim custody of the children pending further order of a court or proper authority in Qatar. If the applicant fails to commence and serve proceedings in Qatar before October 1, 2016, he will be deemed to consent and acquiesce to the children's habitual residence in Ontario thereby confirming this court's jurisdiction under ss. 22(1)(a) and 22(2)(c) of the statute.

The Facts

[3] The parties met while they were attending university in Arizona in 1995. They married in Israel in 1997. After about a year, they emigrated to Arizona. After several years there, they moved to Washington D.C. for the applicant to pursue employment. When that position failed to

meet expectations, the parties agreed to move to Jordan where the respondent's family offered him a position in a family business. That business struggled too.

[4] In 2010, the applicant found a position in Qatar. She obtained a work visa allowing both parties into Qatar. The respondent's entitlement to residency depended on the applicant sponsoring him under her work visa.

[5] The parties had two children in Qatar in 2011 and 2013 respectively. Apart from vacations, the children have lived their entire, albeit brief, lives in Qatar.

[6] The respondent says that the parties' relationship broke down in late March of this year when the applicant lost her job due her having had an extra-marital affair. She denies that she lost her job for that reason. The termination letter from her employer blames a corporate reorganization and down-sizing for the elimination of the applicant's positon. Nothing turns on the cause of the job loss other than to note that the respondent has repeatedly lashed out at the applicant with his allegations of infidelity. He threatens that unless she yields to his demands to return the children to him, he will wait for the children to grow up and then show them some sort of explicit video that he has of them or her.

[7] The applicant says that she grew tired of the respondent's controlling demeanour under which she was not allowed to associate with friends for example. She alleges that he was emotionally abusive to her and the children. She says that he did not work and that he also did not care much for the children. When she lost her job, she decided to leave the respondent and told him that she would withdraw her sponsorship of him in Qatar. The respondent fled back to Jordan rather than be deported, he says.

[8] The applicant then took the children on a pre-planned trip to Australia. While there is no clear statement of the respondent's consent to that travel, there is contemporaneous correspondence between the parties in which the applicant reported the children's activities to the respondent and in which he, rather unrealistically, demanded to see the children immediately despite being thousands of kilometres away. The applicant advised the respondent that she was intending to move to Canada with the children after visiting relatives in Arizona. The respondent appears to have been content to try to move to Vancouver with the applicant if she would agree to stay together. He also wanted to take the children for a visit to his family in Jordan for Eid. This was apparently agreeable to the applicant although plans were never finalized.

[9] While the applicant did not have consent to move with the children from Qatar, at no time did the respondent demand that she return them there. Neither party wants to go back to Qatar. Neither has a current basis to stay there except under tourist visas.

[10] When the applicant arrived in Arizona the respondent was there or arrived soon after. The applicant was concerned about his increasing anger and feared that he might try to keep the children in Jordan where she might have difficulty retrieving them. She offered to allow the

respondent to have supervised access to the children in Arizona. He refused as he found the prospect of allowing the applicant to dictate terms to him to be demeaning.

[11] On May 13, 2016, the respondent commenced urgent proceedings before the Superior Court for Arizona for custody of the children, spousal support, and division of property. He listed his address as being in New York where he was staying with friends before heading to Arizona to go to court. Not surprisingly, the Arizona Superior Court determined that it lacked jurisdiction over the parties. Neither of the parties was domiciled in the state as is required for its jurisdiction rules. On May 26, 2016 the Court expressly ordered that the applicant may travel to Canada with the children in light of her intention to reside with them here.

[12] The applicant brought the children to Toronto. She has found an apartment and a job. She commenced this application on June 17, 2016. The Arizona Superior Court made its final order denying jurisdiction on July 14, 2016,

The Relevant Statutory Provisions

Section 22 of the *Children's Law Reform Act* provides in part:

> 22. (1) A court shall only exercise its jurisdiction to make an order for custody of or access to a child where,
>
> (a) the child is habitually resident in Ontario at the commencement of the application for the order;
>
> (b) although the child is not habitually resident in Ontario, the court is satisfied,
>
> (i) that the child is physically present in Ontario at the commencement of the application for the order,
>
> (ii) that substantial evidence concerning the best interests of the child is available in Ontario,
>
> (iii) that no application for custody of or access to the child is pending before an extra-provincial tribunal in another place where the child is habitually resident,
>
> (iv) that no extra-provincial order in respect of custody of or access to the child has been recognized by a court in Ontario,
>
> (v) that the child has a real and substantial connection with Ontario, and

(vi) that, on the balance of convenience, it is appropriate for jurisdiction to be exercised in Ontario.

Habitual residence

(2) A child is habitually resident in the place where he or she resided,

(a) with both parents;

(b) where the parents are living separate and apart, with one parent under a separation agreement or with the consent, implied consent or acquiescence of the other or under a court order; or

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

whichever last occurred.

[13] Under s. 22, jurisdiction is granted to the court based on either the children being "habitually resident" in Ontario at the date of commencement of the proceeding or fulfillment of a six-part test.

[14] At the time this application commenced the children had barely just arrived here. They were not residing with both parents nor with a person other than a parent. Therefore, under the definition of "habitual residence" in s. 22(2), the only way for the children to be found to be habitually resident here would be if they resided here under a separation agreement, with the consent or implied consent or acquiescence of the respondent, or under a court order. None of those conditions applies. The order of the Arizona court allowed the applicant to travel to Canada. It did not authorize her to reside with the children in Ontario. The court determined that it had no jurisdiction to make such a custody or residency order.

[15] The other way for this court to have jurisdiction is if the applicant can satisfy all six parts of the test in s. 22(1)(b). The parties agree that all six parts must be satisfied for the provision to apply. The applicant cannot satisfy parts (ii) or (v).

[16] There is nearly no evidence, let alone "substantial" evidence, concerning the best interests of the children in Ontario. The only evidence here is that of the applicant. When I deal below with the best interests of the children, I will be relying principally on evidence given by witnesses in Qatar. That is where there nannies, teachers, doctors, and friends with evidence are found.

[17] Similarly, the children have no "real and substantial connection" with Ontario. The applicant was born in Vancouver. The children have never before been to Canada and have but a few relatives here. The only home that they have known and to which they have ties is Qatar.

[18] The respondent argues that the children have numerous relatives on both sides in Arizona. He also says that because the parties took out US citizenship while living in Arizona and the respondent continued to pay US taxes and Arizona taxes while he was retained for a time by the US military in Qatar, the children can be seen to have a real and substantial connection with Arizona. I do not see how one follows from the other or what relevancy that would have in any event.

[19] In light of my findings under s. 22 of the statute, the court has no jurisdiction to hear this application. I note that the applicant did not rely on s. 23 of the statute. There is no evidence that the children would suffer serious harm if they were removed from Ontario or if custody was ordered in favour of the respondent.

Interim Remedy

[20] Section 40 of the statute contemplates a situation where the court does not have jurisdiction to entertain an application for custody as follows:

> Interim powers of court
>
> 40. Upon application, a court,
>
> (a) that is satisfied that a child has been wrongfully removed to or is being wrongfully retained in Ontario; or
>
> (b) that may not exercise jurisdiction under section 22 or that has declined jurisdiction under section 25 or 42,
>
> may do any one or more of the following:
>
> 1. Make such interim order in respect of the custody or access as the court considers is in the best interests of the child.
>
> 2. Stay the application subject to,
>
> i. the condition that a party to the application promptly commence a similar proceeding before an extra-provincial tribunal, or
>
> ii. such other conditions as the court considers appropriate.
>
> 3. Order a party to return the child to such place as the court considers appropriate and, in the discretion of the court, order payment of the cost of the reasonable travel and other expenses of the child and any parties to or witnesses at the hearing of the application. .

[21] I have determined that the court may not exercise jurisdiction under s. 22 and therefore s. 40(b) applies. As a result, the court is empowered to make an order for interim custody or access in the best interests of the children. In addition, the court may stay this application on condition that a party commence a proceeding elsewhere or such other condition as appropriate. I am also authorized to order the children returned to an appropriate place and to order payment of reasonable travel costs. The respondent asks me to order the children to be sent to Arizona and he offers to pay their travel costs. He is not asking for custody at this time. Rather, he is content if the applicant brings the children to Arizona subject to future proceedings before the Arizona courts.

[22] But Arizona has already declined jurisdiction in a final order. The respondent argues that he has now moved to Arizona. He is looking for work and is making plans to school the children there. He argues that if I send the children to Arizona, perhaps the court there will then find that it has jurisdiction.

[23] The point of ss. 22 and 40 of the statute is not for this court to try to invest another court with jurisdiction when it has already ruled that it does not have jurisdiction under its domestic law. I could order the children to Iceland and eventually a court there might take jurisdiction. Looking at s. 22, and especially ss. 22(1)(b)(ii) and (v), the Legislature has determined to defer exercising jurisdiction where there is another jurisdiction that *already* has the evidence about the children's best interests and to which the children *already* have a real and substantial connection. Section 40 speaks of "returning" the children to an appropriate jurisdiction, not trying to invest a new place with jurisdiction by forcing the children to go there.

[24] The place with obvious jurisdiction to decide the custody and marital breakdown issues is Qatar. But, the parties do not want to go back there. That is their choice. This court did not send them there initially and did not tell them when or how to leave. The parties now each prefer that a different court take jurisdiction.

[25] I am keen to the concern that there is a risk that there is no available court with jurisdiction. In *Johnson v. Athimootil*, 2007 CanLII 41434 (ON SC), Justice Harvison Young faced a situation that was similar to this one. In that case, like this one, ss. 22 and 23 did not provide this court with jurisdiction. Justice Harvison Young was concerned that the parties may have had no status to start proceedings in the place in which the children had contacts. She ruled:

> [39] Sections 22 and 23 are not provisions that seek to limit the notion of "real and substantial connection" but rather to apply it to the family law context. It no doubt means that in the vast majority of cases, when the given facts do not fall within its scope, there would be no real and substantial connection between Ontario and the children. This is a rare case in which there is a real and substantial connection despite the fact that the facts do not fall squarely within the considerations articulated in the Act. This is because it is not clear that the father and the children have access as foreigners living there to the courts there, or that the father would seek to access the courts there if he had the

> opportunity, or indeed, that the mother would be able to assert a claim for custody there if she were to return. This raises the possibility that there would be no court that could assert jurisdiction over these two children, which is surely a concern going to the heart of the purpose of the *parens patriae* jurisdiction. In my view, this is simply a circumstance that was not contemplated when these provisions were drafted.
>
> [40] In summary, then, it is appropriate for this court to rely on *parens patriae* power to assume jurisdiction with respect to the custody and access issues related to Sarah and Dennis. [Emphasis added]

[26] Justice Harvison Young was able to find a basis to apply the doctrine of *parens patriae* to protect children who *already* had a real and substantial connection to Ontario in circumstances where there were doubts about whether another court had or would take jurisdiction. In that case the family were all Canadian citizens who had lived here prior to the family relocating to Saudi Arabia. Justice Harvison Young expressly distinguished the facts of the case before her from the "vast majority of cases" in which the children have no real and substantial connection to Ontario. The case at bar falls within that vast majority.

[27] The importance of Justice Harvison Young's finding of a "real and substantial connection" is that it is our short form expression for a bundle of important policies informing the exercise of judicial comity. That is, the "real and substantial connection" test defines when our common law courts will show deference and respect for the sovereignty of other nations while providing certainty and predictability to our own assumption of jurisdiction. See *Johnson* at para. 37. The finding of a real and substantial connection between the children and Ontario in the *Johnson* case provided at least a common law basis for jurisdiction where the statutory situation was uncertain at best.

[28] In this case, as I have found above, there is no real and substantial connection between the children or the parties and Ontario. Were I to base jurisdiction on the concept of *parens patriae*, I would be using an equitable doctrine to take jurisdiction in a case where both the common law and a statute say that the court may not do so. In *L. (N.) v M. (R.R.),* 2016 ONSC 809 (CanLII), Perkins J. held at para. 131

> Dealing first with *parens patriae*, I note the Court of Appeal's recent admonition in *Fiorito v Wiggins*, 2015 ONCA 729 (CanLII), that courts are not to resort unnecessarily to *parens patriae*, particularly when a statute provides an adequate framework to deal with the issues in a case. There is very broad scope in section 16(6) of the *Divorce Act* to impose terms, conditions, and time limits on custody and access. If this scope is not broad enough to do what the father wants and the children need, it is because other statutory or common law rights stand in the way, in which case, *parens patriae* jurisdiction is not available; or else the children's best interests require otherwise, in which case, it should not be used.

[29] In this case, a statute stands in the way and the common law "real and substantial connection" test does not apply. Moreover, in my view, this is not a case of using an equitable doctrine expressing the court's inherent jurisdiction or its *parens patriae* jurisdiction to fill an unintended "gap" in legislation. This is not a case where the statutory scheme does not yield an obvious result in the courts of Qatar. Rather, it is the parties and not the statute that say that Qatar is an undesirable choice. I do not doubt that each may have perfectly valid reasons for believing this to be so. But the problem is not due to any failing of the Legislature. The legislative scheme directs the parties to the court with the most appropriate contacts. There is no gap in the statutory scheme. The statute provides an answer. The parties just do not like it.

[30] As a result, under s. 40, the court is empowered to deal with custody and access in the interim. In light of my finding that this court has no jurisdiction, I am looking only at a very short term stop gap measure.

[31] I see no basis to send the children to Arizona. The existence of some relatives there is a minor factor in my view. Those relatives played little role in the children's lives in Qatar. The father has chosen to go to Arizona rather than seeking a work visa here. He was content to come to Vancouver when he thought he might stay with the applicant. So he had not ruled out coming to Canada until the applicant commenced this application. His concerns now about visa restrictions therefore ring somewhat hollow. While long distance parental relationships are likely not helpful to the children, I am only dealing with the very short term. The father can move much closer to the border and apply for status here if he chooses. As an American citizen, he will have no problem visiting Canada frequently if he chooses to do so.

[32] I noted above that the most important evidence concerning the best interests of the children is from witnesses in Qatar. The affidavit from the applicant's friend is somewhat self-serving and contains oath helping statements provided by the applicant to the witness. However, it also contains third party accounts that support the applicant's claims that the respondent was not very involved with his children and that he exercised overbearing control over the applicant. Of greatest significance is the affidavit's confirmation that it is the applicant who had primary care of the children.

[33] The most compelling evidence however is from the children's former nanny in Qatar. She confirms the applicant's evidence that the applicant was the primary caregiver for the children despite the fact that she worked full time. She is a caring mother. The respondent had little time for or contract with the children despite the fact that he was at home most of the time. He did not play with the children much or even attend their birthday parties. He refused to let the nanny put the children in protective car seats when he drove them.

[34] Finally, the respondent's contemporaneous communications are troubling. His threats to expose a sexually explicit video to the children demonstrates little care for their wellbeing. His threats to the applicant's friend after she provided her affidavit showed him to be a bully as the applicant submits. As far as I can tell, he has never actually taken care of the children and he has

demonstrated no ability to do so other than to say that he is prepared to hire caregivers in Arizona.

[35] While the parties work out the question of jurisdiction, in my view it is plain and obvious that it is in the best interests of the children to remain in the sole custody of the applicant. The respondent wants to know the name of their proposed school. When the applicant disclosed the name or her Toronto employer and landlord in the Arizona litigation, the respondent contacted them and advised that she was soon going to be arrested for kidnapping the children. Interfering with the applicant's employment and residence was not in the best interests of the children who rely on her for room and board. The respondent also had the US Consulate in Toronto visit and report on the children. The consular report indicated that the children were happy and being well cared for. I also note that the respondent declined to see the children when the parties' Arizona lawyers arranged an access visit. In addition, although I ordered several interim access sessions by telephone prior to the hearing of this motion, the respondent availed himself of just one opportunity to speak to the children and then just for three minutes. He has expressly written that he will not consent to the children attending any school in Toronto.

[36] It is plainly not in the children's best interest for the father to know their school. No good can come of that information until the respondent ends his campaign to lash out and punish the applicant and puts the children first.

[37] The respondent has a choice to make. He can commence proceedings in Qatar which is the court that plainly has the best basis for jurisdiction. If he fails to do so, he is effectively acquiescing in the children remaining resident in Ontario. The choice is binary and it must be made soon in order to protect the children from further dislocation and disruption. In my view, if the respondent fails to commence and serve proceedings for custody of the children in Qatar before October 1, 2016, he will be implicitly consenting or acquiescing in the children residing in Ontario thereby confirming this court's jurisdiction under ss. 22(1)(a) and 22(2)(b) of the statute.

[38] Therefore, an order will issue as follows:

a. The applicant is to have interim custody of the children pending further order of a court or proper authority in Qatar or further order of this court depending on the outcome under para. (c) below;

b. The respondent's signature and consent to enroll the children in school in Toronto and to apply for the children's health cards, citizenship, and passports is dispensed with;

c. This application is otherwise stayed until October 1, 2016. In the event that the respondent fails both to commence proceedings seeking custody of the children before a court or proper authority in Qatar and to serve the applicant with originating process in such proceedings before October 1, 2016, he shall be

deemed to have impliedly consented and acquiesced to the children habitually residing in Toronto thereby confirming this court's jurisdiction under ss. 22(1)(a) and 22(2)(b) of the *Children's Law Reform Act*, R.S.O. 1990, c.C.12;

d. Any further access for the respondent will be determined by the court or proper authority in Qatar or here as the case may be; and

e. The respondent's motion is dismissed.

[39] I have deliberately avoided naming the children or providing their birth dates in these reasons with the hope of protecting their privacy from future internet searches. Counsel are to insert their names and birthdates in the formal order in the usual format.

[40] The applicant may file no more than three pages of costs submissions by September 9, 2016. The respondent may file no more than three pages of costs submissions by September 16, 2016. Both parties *shall* also file costs outlines and any offers to settle on which they rely. All submissions shall be delivered as attachments to emails sent to may Assistant in searchable PDF format. No case law or statutory materials are to be filed. Rather, references to cases or to statutory materials, if any, shall be provided by hyperlinks in the parties' submissions.

F.L. Myers J.

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REASONS FOR JUDGMENT

F. L. Myers, J.

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