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— Franks & Zalev - This Week in Family Law

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Child Support Tourism

Taimish v. Al-Kadhimi, 2023 CarswellOnt 302 (S.C.J.) — Himel J.

Taimish deals with the vexing question of whether, and if so, when, a Canadian court can make an order for child support in the face of a pre-existing child support Order from a foreign jurisdiction.

The parties married in 2003 and had one child together. The family lived in Michigan during the marriage, but the mother and child moved to Ontario after the parties separated in 2009. While the father did not consent to the move, he didn't bring a motion to have the child returned to Michigan.

In 2010, the mother started a divorce proceeding in Michigan, and obtained a final divorce judgment that resolved ***all*** of the family law issues, including custody, child support, spousal support, and property. The child support provisions of the divorce judgment required the father to pay the mother $1,700 USD a month until the child turned 19 $^{1}/_{2}$ years old at the latest. Both parties had Michigan lawyers when the divorce judgment was granted.

In 2013, the father left Michigan and moved first to Georgia, and then to Nebraska.

In August 2016, the father brought a motion in Michigan, alleging the mother was not complying with the parenting provisions of the divorce judgment. However, his motion was dismissed because, at that point, neither party lived in Michigan.

In December 2016, the mother commenced an Application in Ontario for, among other things, child support retroactive to 2010. The father defended the Application and took the position, among other things, that child support could only be dealt with by the court in Michigan, or pursuant to the *Interjurisdictional Support Orders Act, 2002*, S.O. 2002, c. 13 (the "*ISOA*").

Despite initially taking the position that the child support issues should be dealt with in Michigan, in December 2019, the father advised the mother that "he agrees and consents to the Ontario court having jurisdiction over child support since the date of issuance of pleadings, and ongoing." However, he subsequently changed his mind, yet again, and brought a motion for summary judgment to dismiss the mother's child support claims on jurisdictional grounds.

In deciding the motion, Justice Himel provided a helpful summary of the law as to the ability of an Ontario Court to make a new child support Order that would be inconsistent with the terms of a valid and subsisting child support Order from a non-Canadian jurisdiction. As she explained in her reasons:

[26] . . . a. **A foreign support order that is properly made and is in full force and effect is not only relevant but is binding upon the parties. As a matter of public policy there should not be two outstanding support orders** [*Sun v. Guilfoile* (2011), 96 R.F.L. (6th) 397 (Ont. S.C.J.)]. A child support order in Ontario creates two competing orders.

b. It is well established that, **generally speaking, a court cannot vary a corollary support order contained in a foreign divorce under the *Family Law Act***. This is logical for a variety of reasons as set out in the caselaw. **The only mechanism to make such a variation is pursuant to the interjurisdictional support statutes** [*Rubio v. Joslin* (2018), 7 R.F.L. (8th) 240 (Ont. C.J.) at paras. 43-45]. Given that the Court cannot vary a federal child support order by Ontario legislation in accordance with the principles of paramountcy, **one ought not be able to vary a child support order contained in a foreign divorce judgment by provincial legislation**. The Court should be respectful of orders made by foreign courts (as per the notion of comity).

c. In the leading Ontario Court of Appeal case of *Cheng v. Liu*, [(2017), 94 R.F.L. (7th) 23 (Ont. C.A.)] the court permitted the adjudication of child support where there was no existing foreign divorce order incorporating provisions for child support. This decision has been considered approximately 27 times since its release in 2017. **The cases below provide certain instances/exceptions where the Court may make an order for child support in accordance with the *Family Law Act*, even though there is a valid foreign divorce order.** The first three instances/exceptions clearly do not apply for the following reasons:

i. **The foreign divorce is silent as to child support.** The Ontario Court has the jurisdiction to make an original order for child support [See e.g., *Zeineldin v. Elshikh* (2020), 38 R.F.L. (8th) 147 (Ont. S.C.J.), at para. 15]. This approach follows *Cheng v. Liu*.

ii. **The jurisdiction that issued the foreign divorce (with child support provisions) is not a reciprocating jurisdiction under the *ISOA***. The Ontario Court has the jurisdiction to make an original order for child support. The Unites [*sic*] States is a reciprocating jurisdiction [*Rubio v. Joslin* (2018), 7 R.F.L. (8th) 240 (Ont. C.J.), at paras. 43-45]. This exception does not apply.

iii. There is **flagrant non-compliance with the existing order for child support as contained in the foreign divorce** [*Krause v. Bougrine* (2022), 69 R.F.L. (8th) 257 (Ont. C.A.)]. Not only has the father fully complied with the Divorce Judgment, he is in compliance with the Bird J. without prejudice order for increased child support and 80% of the child's section 7 expenses. This exception does not apply.

iv. The fourth instance/exception to the limits imposed in *Cheng v. Liu* was considered by Diamond J. [in *Leavens v. Fry*, 2020 CarswellOnt 12401 (S.C.J.)] following a review of various cases (that were decided both before and after the Court of Appeal decision). In summary, **where there has been a material change in circumstances leading to a legitimate claim for custody and access in Ontario, and where the Court is satisfied that a foreign order for custody and access should be superseded, the issue of child support can arise anew**. However, the parenting time claims cannot be a tactic to establish jurisdiction to claim child support or an attempt to forum-shop as a means to obtain a better order than that contained in the foreign divorce.

. . . . .

d. **Other than as set out above, where child support is included in a foreign divorce order any variation must proceed in accordance with *ISOA***. While it is true that the *ISOA* is not obligatory where parties wish to vary terms of a separation agreement, no other option is available in Ontario where there is a foreign divorce incorporating child support terms. [*V. (L.R.) v. V. (A.A.)* (2006), 43 R.F.L. (6th) 59 (B.C. C.A.), cited and distinguished in *Jasen v. Karassik*, [(2009), 62 R.F.L. (6th) 63]. [emphasis added]

The first three exceptions clearly did not apply in this case — the foreign divorce Order specifically dealt with child support, Michigan was a reciprocating jurisdiction under the *ISOA*, and the father was paying the child support he owed under the

Michigan Order. Thus the main question Justice Himel had to decide was whether the fourth exception — a material change leading to a legitimate claim for custody and access in Ontario — applied on the facts of this case.

Although the father made various claims for relief with respect to the parenting issues in the Ontario proceeding, both parties agreed that the parenting issues were not seriously in dispute, and that child support was the only real issue. Accordingly, Justice Himel concluded that the fourth exception also did not apply. Four strikes? This is starting to sound like T-Ball for the "Not Resilient Child."

In dealing with this particular issue, it is also helpful to review what the Ontario Court of Appeal said in *Okmyansky v. Okmyansky* (2007), 38 R.F.L. (6th) 291 (Ont. C.A.). There, the Court of Appeal confirmed that, following a divorce, the court that granted the divorce would have exclusive jurisdiction over child support in the following situations:

> (a) whenever the divorce court has granted child support, no matter how nominal or how limited in time;
>
> (b) whenever the divorce court, after considering the question of support, has refused to grant it or rejected the prayer to grant it; or
>
> (c) whenever the divorce court has reserved its right to make subsequent pronouncements on support.

That is, where a foreign court issuing a divorce has not adjudicated the issue of child support, provincial legislation is a valid means of seeking a child support remedy. Where a foreign court has issued a valid divorce judgment, an Ontario court will "maintain" (remember that word) jurisdiction under the *Family Law Act* to adjudicate and award child support — only if the foreign divorce judgment has not dealt with the issue of child support. But those were not the facts in *Taimish*.

With respect to the fact that the father had previously agreed that Ontario could take jurisdiction, her Honour found that "the father cannot be found to have attorned to the jurisdiction", because "[p]arties cannot confer jurisdiction where there is none."

As a result, Justice Himel dismissed the mother's claim for child support.

While we agree with most of Justice Himel's decision (which is certainly mostly supported by the Ontario Court of Appeal in *Okmyansky*), we are not sure we entirely agree with her conclusion on the issue of attornment. At there very least, it raises an interesting question.

It is certainly true that, as the Ontario Court of Appeal noted in *Rothgiesser v. Rothgiesser* (2000), 2 R.F.L. (5th) 266 (Ont. C.A.) at para. 33, "the assertion that the parties cannot confer jurisdiction on a court where it otherwise lacks subject-matter jurisdiction is unequivocally correct." However, the significant difference between *Taimish* and *Rothgiesser* is that in *Rothgiesser* the Court of Appeal determined that:

> 1. The *Divorce Act does not permit* a Canadian Court to make an initial Order for support under s. 15.2 for parties who were divorced outside of Canada.
>
> 2. Section 17.2 of the *Divorce Act does not allow* a Canadian court to vary the spousal support provisions of a ***foreign*** divorce judgment, whether on consent or otherwise.

"Does not permit" and "does not allow" are notions of jurisdiction *simpliciter*. In other words, there is no provision in the *Divorce Act* that would allow a Canadian court to make a spousal support Order under the *Divorce Act* for parties who were divorced outside of Canada. A party could not attorn even if they wanted to because Ontario does not have jurisdiction to deal with the issue. You can't swim in a pool with no water even if you *want* to go swimming.

In contrast, in cases like *Taimish*, a court in Ontario has jurisdiction *simpliciter* to make a child support Order under s. 33 of the *Family Law Act*, which allows a court in Ontario to "order a person to provide support for his or her dependants and determine the amount of support", and provides that the Application may be brought by either the dependant (i.e. the child) or the dependant's parent. The real question to be asked in the child support context is ***whether the court in Ontario should exercise***

its jurisdiction, or decline to do so for some reason, perhaps on the basis that it does not have a real and substantial connection to the dispute, or perhaps because Ontario is *forum non-conveniens*. [For further discussion of the real and substantial connection test and the test for *forum non-conveniens*, see *Haaretz.com v. Goldhar*, 2018 CarswellOnt 8883 (S.C.C.).]

Then, in *Yan v. Xu*, 2023 CarswellOnt 2355 (S.C.J.), Justice Diamond in these circumstances refers to situations where an Ontario Court will "maintain" (there's that word again) jurisdiction to award support under the *Family Law Act* in one of the circumstances above. In order to "*maintain*" jurisdiction, the court must first *have* jurisdiction.

Given the father's previous agreement that Ontario should deal with the matter, it was certainly at least *arguable* that the father had attorned to the Courts of Ontario. That said, Ontario courts do have to vigilant — as her Honour clearly was in this case — that parties subject to foreign support orders do not engage in "support tourism" in an effort to take advantage of Ontario's support laws. Here, however, it would have been for the father to contest Ontario jurisdiction. If he was prepared to attorn, who are we to stop him?

Those Californians Are So Nice. Let's Give Them Some Help. And Let's Call It Letters Rogatory.

Adler v. Deloitte Touche Tohamtsu, 2022 CarswellOnt 17640 (C.A.) — Simmons, Benotto, and Favreau JJ.A.

The husband in this case is no stranger to the courts in Ontario, as his first divorce was the subject of numerous reported decisions, including multiple attempts to adjourn a pending trial (*Adler v. Adler* (2015), 73 R.F.L. (7th) 144 (Ont. S.C.J.) and 2016 CarswellOnt 586 (S.C.J.)), and an unsuccessful attempt to assess his own lawyers' accounts (*Adler v. Thomson, Rogers*, 2019 CarswellOnt 16274 (C.A.)).

The husband has now separated from his second wife (the "wife"), and is yet again engaged in contentious and complicated family law litigation. But this time, the case is being litigated primarily in the California sun instead of in Ontario.

Despite multiple attempts by the wife to compel the husband to provide financial disclosure through the court in California, and even though the court in California held ***six hearings*** and imposed a $25,000 sanction against the husband, he apparently still did not provide the necessary information.

In an effort to circumvent the need for the husband's cooperation (if the mountain won't come to Muhammad . . .) by obtaining the information directly from various third parties, the wife asked the court in California to make Requests for International Judicial Assistance — otherwise known as Letters Rogatory or Letters of Request — to ask for the help of courts in other jurisdictions to obtain information about the husband's finances from various corporations (including in Ontario) who were not otherwise subject to the California court's jurisdiction.

After the California court issued the Requests for Judicial Assistance, the wife brought an Application in Ontario to ask the Ontario court to enforce them.

The Application judge, Justice Diamond, granted the relief the wife had requested, subject to some modifications with respect to production of certain emails between the husband and his assistant.

The husband appealed the Application judge's Order to the Ontario Court of Appeal.

The Court of Appeal started its analysis by discussing the general principles that apply when dealing with Letters Rogatory:

> [11] A letter rogatory is a request from a judge to the judiciary of a foreign country for the performance of an act which, if done without the sanction of the foreign court, would constitute a violation of that country's sovereignty. In this case, the request is for production of documents from corporations in Canada.

. . . . .

> [13] The authority to enforce letters rogatory is set out in the *Canada Evidence Act*, R.S.C. 1995, c. C-5, at s. 46(1), as well as in the *Evidence Act*, R.S.O. 1990, c. E.23, at s. 60(1). The requirements are:
>
> a) a foreign court, desirous of obtaining testimony in relation to a pending civil, commercial or criminal matter, has authorized the obtaining of evidence;
>
> b) the party from whom the evidence is sought is within the jurisdiction of Ontario;
>
> c) the evidence sought from the Ontario party is in relation to a pending proceeding before the foreign court or tribunal; and
>
> d) the foreign court or tribunal is a court or tribunal of competent jurisdiction.

When considering whether or not to enforce Letters Rogatory, the court must consider the six factors that were summarized by the Ontario Court of Appeal in *Perlmutter v. Smith*, 2020 CarswellOnt 12823 (C.A.):

> • Is the evidence sought relevant?
>
> • Is the evidence sought necessary for trial and will it be adduced at trial if admissible?
>
> • Is the evidence sought not otherwise obtainable?
>
> • Is the order sought contrary to public policy?
>
> • Are the documents sought identified with reasonable specificity?
>
> • Is the order sought not unduly burdensome, having in mind what the relevant witnesses would be required to do and produce if the action was tried here?

Finally, explained the Court of Appeal, when dealing with a request to enforce Letters Rogatory, courts in Canada should also consider whether the request was overly vague, whether a request for information from a non-party would otherwise be contrary to local laws of civil procedure, and/or whether the party seeking the information was merely engaged in a fishing expedition.

[For a more detailed discussion of the history of Letters Rogatory in Canada, and the policy concerns and other potential issues they raise, see also the Ontario Court of Appeal's recent decision in *Actava TV, Inc. v. Matvil Corp.*, 2021 CarswellOnt 1914 (C.A.) at paras. 39-61. In *Actava*, the Court of Appeal emphasizes that while international judicial assistance, comity and deference to foreign courts are important, a Canadian court should not enforce a foreign order that is contrary to our public policy or otherwise prejudicial to our citizens or sovereignty. There are limits to the good-nature and cooperative nature of Canadians.]

The husband raised several arguments in the Court of Appeal about why the Application judge was wrong, including that the wife was on a fishing expedition, and had not established that the documents were not "otherwise obtainable."

The Court of Appeal was having none of it — not surprising given his history in Ontario court and that there had already been ***six hearings*** in California about this very issue — and reiterated the frustration that has been repeatedly expressed by numerous judges and courts across Canada (including the Supreme Court) about the problem of non-disclosure in family law:

> [21] The obligation of financial disclosure in family law litigation is basic. Despite extensive jurisprudence and rule amendments, litigants continue to resist disclosure. Full financial disclosure is immediate and absolute. Failure to disclose has been called "the cancer of family law litigation": *Michel v. Graydon*, 2020 SCC 24, 449 D.L.R. (4th) 147, at para. 33. This court has repeatedly echoed similar comments. The documents are clearly relevant and would be required to be produced in Ontario.

The Court of Appeal also disagreed with the husband's arguments on the merits, and recognized that:

> [23] I do not accept [the husband's] characterization of the order as a "fishing expedition". Production of documents that are required in order to assess responsibility for family law obligations is not a "fishing expedition", but, instead, a normal part of the disclosure process.
>
> [24] . . . There were multiple attempts, court orders and sanctions in play to obtain disclosure. It is clear from the record that the documents were not otherwise obtainable.
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> [25] I disagree with [the husband]'s overarching submission that the application judge's analysis ran afoul of this court's decision in *Actava*. The application judge's reasons plainly show that he carefully considered the record, finding no public policy reason why the California court should not be shown deference by the Ontario court, as well as independently considered whether the requests complied with Ontario's legal requirements for enforcement. It is clear from the reasons that the application judge meaningfully addressed the criteria for granting letters rogatory and, therefore, I see no error in his reasoning.

The Court of Appeal dismissed the husband's appeal with costs, and ordered the husband to pay the wife $20,000 in costs.

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