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— Franks & Zalev - This Week in Family Law

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Contents

- It Just Keeps Going And Going And Going And Going . . .
- I Would't Say I'm "Anti-Suit" — But I Do Prefer to Be Comfortable

It Just Keeps Going And Going And Going And Going . . .

***J.D. v. B.J.T. and A.D.D.*, 2023 CarswellPEI 72 (C.A.) — Gormley C.J.P.E.I., Murphy J.A., and Jenkins J.A.**

Issues: Prince Edward Island — Parenting — Court Delays

The Supreme Court of Canada is the highest court in the land, and one would think that when it decides to hear a matter, its decision will be final and end the dispute. But not in the family law realm, where far too many of the cases that have gone all the way up to the Supreme Court of Canada have, just like the Energizer Bunny and far too many other high conflict family law cases, just kept going and going and going and going.

[For examples of cases that have gone all the way to the Supreme Court of Canada and then kept going, see e.g.: *Bracklow v. Bracklow* (1999), 3 R.F.L. (5th) 179 (B.C. S.C.); and *Hartshorne v. Hartshorne* (2010), 82 R.F.L. (6th) 1 (B.C. C.A.). Several other cases, including *Miglin v. Miglin*, also involved further litigation but did not result in reported decisions.]

B.J.T. is another case where the Supreme Court of Canada's decision didn't end the fight. As you will remember from our discussion about the case in the June 13, 2022 (2022-21) edition of *TWFL*, the case was about whether a young child, W.D., should be placed in the care of his biological father, or with his maternal grandmother. The basic facts were as follows:

- The mother and father met in Alberta. They were married in 2012, and separated in 2013.
- When the mother and father separated, the mother moved to P.E.I., and gave birth to W.D. The father did not know the mother was pregnant when they separated, and did not learn of W.D.'s existence until many years later.
- The mother gave birth to W.D. in P.E.I. in October 2013.
- The mother had significant mental health challenges, and was unable to care for W.D. by herself. As a result, in 2014 the maternal grandmother left her home in Alberta, and came to P.E.I. to help the mother care for W.D.
- In August 2017, the mother started refusing to allow the maternal grandmother to see W.D.
- In January 2018, the Director of Child Protection for the Province of Prince Edward Island (the "Director") apprehended the child, and in May 2018 the court in P.E.I. found that W.D. was in need of protection and placed him in the temporary custody of the Director for three months.

- When the maternal grandmother learned that W.D. had been apprehended, she took the necessary steps to become a foster parent, and W.D. was placed in her day-to-day care shortly after the Director was granted temporary custody of him.
- In February 2019, the Director contacted the father and advised him for the first time that he had a son. The father took steps to meet and build a relationship with W.D., and ultimately took the position that W.D. should be placed in his care in Alberta.
- On July 2, 2019, the court in P.E.I. determined that the maternal grandmother met the statutory definition of a parent under the *Child Protection Act*, and had the right to file a parenting plan and seek permanent custody of W.D. in the ongoing child protection case.
- On July 3, 2019 (i.e. the day after the P.E.I. court determined the maternal grandmother met the statutory definition of a parent), without any notice, the Director terminated the foster parent arrangement with the maternal grandmother, removed W.D. from her care, and placed W.D. with new foster parents who were complete strangers to him. The Director also limited the grandmother to supervised visits with W.D. for four hours a week.
- In August 2019, the Director sent W.D. to visit the father in Alberta. Although the visit was only supposed to last three weeks, the father never returned W.D. to P.E.I.
- The final hearing in the child protection case took place in P.E.I. in early 2020, and in June 2020 the trial judge granted custody of W.D. to the grandmother instead of the father.
- The father appealed the trial judge's decision, and obtained a stay pending the appeal.
- In November 2020, in a 2-1 decision, the P.E.I. Court of Appeal granted the father's appeal, and ordered that W.D. be placed in the custody of the father.
- The grandmother sought leave to appeal to the Supreme Court of Canada, and the court granted leave in June 2021.
- The appeal was argued in early December 2021, and at the conclusion of oral arguments, the Supreme Court granted the grandmother's appeal with reasons to follow, and ordered that W.D. would remain with the father until March 21, 2022, at which point he would be returned to the grandmother in P.E.I., and that the grandmother would have custody.
- In June 2022 (i.e. six months after the appeal was granted), the Supreme Court released its reasons.

As we discussed in the June 13, 2022 (2022-21) edition of *TWFL*, the Supreme Court of Canada's decision is important for two reasons. First, the court confirmed that the narrow scope of appellate review in parenting cases also applies in the child protection context. Second, the court expressly rejected the majority of the P.E.I. Court of Appeal's conclusion that, all other things being equal, it is in a child's best interests to be placed with a biological parent, and determined that "a biological tie in itself should generally carry minimal weight".

But what we didn't know when the Supreme Court released its decision was that even though it had ordered the father to return W.D. to the grandmother's care in P.E.I. by March 22, 2022, W.D. had still not been returned to P.E.I. by the time the Supreme Court released its reasons in June 2022. Instead, in the face of the Supreme Court's Order, the father somehow managed to persuade a judge in Alberta to exercise its *parens patriae* jurisdiction to stay the Supreme Court's decision, and to grant the father temporary custody of W.D. in Alberta. While the grandmother was eventually able to have the stay overturned, its effect was to delay W.D.'s return to P.E.I. for another four months (from March 22, 2022 to July 24, 2022).

But even though W.D. was eventually returned to P.E.I. (almost three years after he was unilaterally removed from P.E.I. by the father), the litigation continued, and the father took the position that the court in P.E.I. should enforce the Order from Alberta that granted him temporary custody.

Justice Key of the P.E.I. Supreme Court resoundingly rejected the father's request to enforce the Order from Alberta, and found that the father had obtained the Alberta Order by misleading the presiding judge, and that enforcing the Alberta Order would constitute a collateral attack on the Supreme Court of Canada's decision.

The father appealed to the P.E.I. Court of Appeal. While his appeal was dismissed, we suspect the dismissal is still not going to end the fight, because the parties have still not agreed on what access, if any, the father should have going forward, and the court has yet to adjudicate this issue.

To briefly recap, in August 2019, the almost 6-year-old child left P.E.I. and travelled to Alberta for what was supposed to have been a three week visit with his father. However, instead of returning, he remained in Alberta for the two and a half years it took for the case to wind its way up to the Supreme Court of Canada, and for the Supreme Court to order his return to P.E.I. (in December 2021). It then took another six months for the Supreme Court to release its reasons (in June 2022), and another month after that for the father to comply with the Supreme Court's Order (in July 2022). After the child was returned to P.E.I., the litigation then continued for another year and a half, and is likely still not done.

We know that the courts are busy, judges are overworked, and Governments have failed to provide the family justice system with the resources it needs. We also realize that *B.J.T.* involved a complicated fact scenario and multiple appeals. But with the greatest of respect, the delays in this case, and far many other high conflict parenting cases, are simply unacceptable. It should *never* take years for the courts to decide on the parenting arrangements for a young child on a final basis. To use the words of the Supreme Court of Canada in *R. v. Jordan*, 2016 CarswellBC 1864 (S.C.C.):

Timely justice is one of the hallmarks of a free and democratic society. . . . An efficient [family] justice system is therefore of utmost importance. The ability to [adjudicate family law cases on a final basis] within a reasonable time is an indicator of the health and proper functioning of the system itself. The stakes are indisputably high. . . . Our system, however, has come to tolerate excessive delays and have fostered a culture of complacency within the system towards delay. . . . A change in direction is therefore required.

We could not agree more, and suggest that the time has come to make radical changes to the Rules to ensure more timely access to justice in family law cases, and to prevent such cases, particularly those involving young children, from languishing in the system for years or more without end. [For further discussion of some potential changes that could be made to the Rules to reduce delay in the family justice system, see "At the Risk of Repeating Ourselves — This is No Way to Run a Railroad" in the January 23, 2023 (2023-03) edition of *TWFL*.]

I Would't Say I'm "Anti-Suit" — But I Do Prefer to Be Comfortable

***Pan v. Zhao* (2024), 99 R.F.L. (8th) 370 (Ont. S.C.J.)**

Issues: Ontario — Anti-Suit Injunction

In this case, the Applicant/Wife was claiming an anti-suit injunction against the Respondent/Husband.

The Wife commenced an Application in Ontario on December 30, 2022. She claimed a divorce and relief related to parenting, child support, spousal support, equalization of net family property and an order for the sale of jointly owned property.

The Husband was served, and he filed his Answer on February 3, 2023. He sought a divorce, parenting orders, equalization of net family property and an order for the sale of jointly owned property.

Although the Husband did not raise the issue of jurisdiction in his Answer, he did make reference to commencing a family law claim in China — and that is exactly what he did, in April of 2023. In that proceeding, he sought relief relating to a divorce, parenting, child support, a division of jointly owned property, an order for the repayment of joint debts and compensation for "mental damage" caused by the Wife's infidelity.

The parties attended a Case Conference in Ontario on October 18, 2023.

The Wife brought a motion asking that the Husband be ordered to withdraw or stay (or otherwise terminate) the proceedings in China. This is more commonly known as an "anti-suit injunction." [See, generally, *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, 1993 CarswellBC 1257 (S.C.C.)] In response, the Husband asked that the Ontario Application be adjourned until there was a "final outcome of lawsuits in China."

Justice Vella determined that Ontario had jurisdiction *simpliciter* over the parties and that she was able to exercise *in personam* jurisdiction over the Husband.

The Husband had attorned to the jurisdiction of the Ontario Superior Court. He filed an Answer and sought substantive relief from the court in Ontario. The Husband did not bring a motion challenging jurisdiction and had litigated the proceeding on the merits. And that amounts to attornment. [See *Beals v. Saldanha*, 2003 CarswellOnt 5102 (S.C.C.) at para. 37; *Kunuthur v. Govindareddigari* (2018), 18 R.F.L. (8th) 59 (Ont. C.A.) at para. 18; *C.C. v. J.B.*, 2021 CarswellOnt 7917 (C.A.) at para. 9; *Buck v. Buck*, 2013 CarswellBC 690 (S.C.); *Boyd v. Boyd*, 2001 CarswellBC 2205 (C.A.).]

In addition, both parties were ordinarily resident in Ontario at least until the date of separation, and the Wife and children remained ordinarily resident in Ontario at the time of the motion. The parties' youngest child had been born in Ontario and the eldest had been born in China. The two largest assets, being the matrimonial home and a rental property, were located in Ontario. The Husband traveled extensively between Ontario and China, though he claimed that he spent most of his time in China.

Justice Vella found jurisdiction *simpliciter* on both consent-based attornment and on the real and substantial connection test: *Club Resorts Ltd. v. Van Breda* (2012), 10 R.F.L. (7th) 1 (S.C.C.). Since *Wang v. Lin* (2013), 29 R.F.L. (7th) 1 (Ont. C.A.), a "presumptive connecting factor" has been the "ordinary residence" or "real home" of the parties: *Naeli v. Ghaeinizadeh*, 2013 CarswellOnt 5 (C.A.); *Li v. Li* (2021), 63 R.F.L. (8th) 327 (Ont. C.A.).

Having found jurisdiction, Justice Vella then considered whether Ontario should decline to exercise jurisdiction on the basis of *forum non-conveniens*.

The Husband consented to Ontario having jurisdiction over parenting and child support, given the children's residence. He also conceded that the "remedy for the divorce" (i.e. the equalization of net family property) should be determined in Ontario. However, the Husband expressed concern that withdrawing his claim for a divorce in China might lead to the termination of the entire proceeding by the People's Court, thereby preventing him from pursuing his claim for damages arising from the Wife's alleged adultery. Although the Husband claimed this was permitted under Chinese family law, it is (clearly) not recognized under the *Divorce Act*.

The Husband further argued that the Ontario Superior Court should wait until certain debts were determined in China, as he claimed they would impact the determination of equalization. Specifically, the Husband's father had sued the parties in China and had obtained a default judgment in the amount of \$3.3 million. The debt purported to relate to funds loaned to the parties to buy the matrimonial home and rental property in Ontario. The Husband had appealed the judgment, but his first appeal had been dismissed. He claimed that he had not yet exhausted his appeals.

The Husband's sister had also sued the parties in connection with a \$1.33 million debt. That lawsuit was ongoing. Such family harmony.

The Husband argued that the Superior Court could not appropriately adjudicate equalization until the outcomes of the two lawsuits in China were finally determined. Justice Vella disagreed, asserting that Ontario courts are able to adjudicate the value of debts that may arise in another country since the parties are required to "adduce the requisite evidence for such valuations." In the event that a final judgment was obtained on either of the debts prior to trial, evidence of that judgment could be adduced.

We are not entirely sure we agree with the technicalities here. Yes — Ontario courts are able to adjudicate the *value* of debts that may arise in another jurisdiction; but the law of debtor and creditor in that other jurisdiction must be proven as a matter

of fact. Ontario will have to apply the internal law of China to determine whether or not the debts were valid. Foreign law is a question of fact to be proved by a qualified witness; only absent such proof is foreign law assumed to be the same as local law: *Hunt v. T & N plc*, 1993 CarswellBC 1271 (S.C.C.). But we digress.

In addition, Justice Vella likely did more heavy lifting here than necessary. Parties to an action are free to select or accept the jurisdiction in which their dispute is to be resolved: *Beals v. Saldanha*, 2003 CarswellOnt 5101 (S.C.C.). A party that has voluntarily attorned to the jurisdiction of a court *has consented to having the issues in dispute determined by that court*. And where jurisdiction is established through such consent, as in this case, it is not necessary to consider whether there are other grounds upon which a court's jurisdiction might be either recognized or challenged, such as whether the parties had a real and substantial connection with the jurisdiction in question: *Wolfe v. Pickar*, 2011 CarswellOnt 2996 (C.A.) at paras. 43-44. Therefore, it was not actually necessary for her Honour to consider jurisdiction simpliciter and real and substantial connection.

Finally, Justice Vella considered whether or not to grant the anti-suit injunction. She described the test for an anti-suit injunction as follows:

[29] The test that must be met by the moving party seeking an anti-suit injunction has been described as follows:

- a. It is preferable (not mandatory) that a foreign proceeding is pending;
- b. It is preferable (not mandatory) that the applicant has not obtained a stay from the foreign court already;
- c. The domestic court is the "potentially appropriate forum";
- d. The domestic forum has the closest connection to the action and the parties, and no other forum is clearly more appropriate; and
- e. There is no injustice to the parties if the forum [sic] proceeding does or does not go forward, and an injunction will not deprive the forum [sic] plaintiff of advantages in the foreign jurisdiction, which would be an unjust deprivation: *Shaw*, at para. 21; *Borschel v. Borschel* (2020), 43 R.F.L. (8th) 366 (Ont. S.C.J.), at para. 93; *Bell'O International LLC v. Flooring & Lumber Co.*, 2001 CarswellOnt 1701 (S.C.J.), at para. 9, citing *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, 1993 CarswellBC 47 (S.C.C.), at p. 519.

In an anti-suit injunction, the local court exercises its *in personam* jurisdiction over a party to restrain them from proceeding with a foreign action: *Shaw v. Shaw*, 2007 CarswellOnt 4417 (S.C.J.) at para. 24. It does *not* (and could not) however, restrain the foreign court from proceeding.

Justice Vella then considered each of the elements:

- A. It was uncontested that there was a foreign proceeding pending.
- B. The Wife had not obtained a stay from the People's Court in China.
- C. There was no suggestion that Ontario was *not* a potentially appropriate forum to adjudicate the issues relating to the parties' separation.
- D. Justice Vella had already found a real and substantial connection between Ontario and the parties.
- E. The Husband argued that there would be injustice to him if he could not proceed in China because his claim for compensation for alleged adultery was impossible to pursue in Ontario. There was, however, no evidence on the law of China concerning as to whether or not he actually *could* make that claim. Without that evidence, there was no basis to advance that claim.

Justice Vella also set out that not being able to pursue a claim for compensation based on alleged adultery did not amount to an unjust deprivation. The Husband had voluntarily attorned to the jurisdiction of the Ontario Superior Court and conceded

that Ontario's domestic law applied to all the claims advanced in the context of the Wife's Application. When he did this, he was aware that Ontario did not recognize a claim for compensation arising from adultery. In addition, while torts of this kind existed in the past, they have been abolished in Ontario: *Kungl v. Schiefer* (1962), 3 R.F.L. Rep. 130 (S.C.C.) and *Frame v. Smith* (1987), 9 R.F.L. (3d) 225 (S.C.C.). Consent to the jurisdiction of a court necessarily involves consent to the laws applicable in that jurisdiction: *Mehralian v. Dunmore* (2023), 94 R.F.L. (8th) 255 (Ont. C.A.).

In contrast, the Wife would be unable to pursue a claim for spousal support in the event that China granted a divorce — unless she could prove that the Husband was engaged in "unfair forum shopping": *Vyazemskaya v. Safin* (2024), 99 R.F.L. (8th) 247 (Ont. C.A.) [see the April 22, 2024 (2024-16) edition of *TWFL* — don't get us started].

The court determined that the elements for granting an anti-suit injunction were met and enjoined the Husband from continuing with his divorce proceedings in China.

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