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— Franks & Zalev - This Week in Family Law

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Contents

Family Law + *Bankruptcy and Insolvency Act* = Mal à la Tête

Jesson v. Jesson, 2021 CarswellAlta 257 (Q.B.) - Yungwirth J.

Family law statutes and the *Bankruptcy and Insolvency Act* mix like . . . well . . . they don't really mix at all. As Justice Yungwirth notes in this decision, law reform in the area is required to avoid injustice.

The husband filed for bankruptcy. The wife applied under Rule 4.34(1) of the *Alberta Rules of Court*, Alta. Reg. 124/2010 (the "*Rules*") to lift the automatic stay under section 69.3 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "*BIA*"). She wanted to pursue her claims for child and spousal support, and her matrimonial property action. The bankruptcy Trustee opposed the wife's request to lift the stay.

The parties began cohabiting in 1994, were married on August 2, 1997, and separated on July 2014. They had two children.

The wife started proceedings in February of 2018, and the husband responded the same month. On January 17, 2019, the court made an interim award that the husband pay $1,458 in child support based on a Guideline income of $100,000. However, the day before the wife's motion for interim child and spousal support was heard, on January 16, 2019, the husband made an assignment in bankruptcy.

The husband's Statement of Affairs showed total assets of $1,777,748, secured debts of $960,635, and preferred debts of $10,728. The bankruptcy documents showed a number of exempt assets, including a LIRA of $117,039 and RRSPs of about $23,000. The wife alleged the husband filed a false Statement of Affairs as he had not disclosed his corporate assets of $4 million. At the time of the motion before Justice Yungwirth, the husband was also in arrears of $24,972.40 on his child support obligation.

The husband took the rather disingenuous position that he neither had to make disclosure nor attend questioning because the Trustee stood in his place for the matrimonial property proceedings. However, the wife said that all her requests for disclosure from the Trustee had been refused. In response to a request for disclosure that the wife's lawyer had sent to the Trustee, the Trustee advised that the only information that could be provided was the signed bankruptcy document. The wife was essentially being batted around like a ball of yarn between two cats.

As Alberta is a "division of property" jurisdiction as opposed to an "equalization" jurisdiction (as those terms are used in *Schreyer v. Schreyer* (2011), 1 R.F.L. (7th) 1 (S.C.C.)), a family property claim is not "provable" in the bankruptcy under s. 121 of the *BIA*. As noted by Justice Yungwirth:

> [14] The intersection of family law and bankruptcy is an area where much reform is needed. The above summary highlights the difficulties that arise when a bankruptcy stalls the divorce and matrimonial property proceedings and interferes with the disclosure process that would allow property and support issues to be determined.
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> . . . . .
>
> [16] The property interests of a spouse/partner pursuant to the Alberta's family property legislation are quite different than the claims of creditors under the *BIA*. When the interests of a spouse/partner are viewed through the commercial lens, this disregards the complexities of the spousal/partner relationship and the legislation specifically designed to assess and divide property interests acquired during cohabitation. It also ignores the fact that there will often be assets accumulated during the relationship, for which there is no proof of ownership by the non-bankrupt spouse/partner, notwithstanding that a spouse/partner has an interest in property pursuant to the provisions of the provincial family property legislation. In the result, an injustice may result for the non-bankrupt spouse/partner if their interests are not considered before the bankrupt's estate is determined in the bankruptcy process.

Justice Yungwirth was of the view that the proper way for the wife to address her family property claims within the scheme of the *BIA* was through s. 81 of the *BIA* (again, remembering that Alberta is a "division of property" as opposed to an "equalization" jurisdiction):

> 81 (1) Where a person claims any property, or interest therein, in the possession of a bankrupt at the time of the bankruptcy, he shall file with the trustee a proof of claim verified by affidavit giving the grounds on which the claim is based and sufficient particulars to enable the property to be identified.
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> (2) The trustee with whom a proof of claim is filed under subsection (1) shall within 15 days after the filing of the claim or within 15 days after the first meeting of creditors, whichever is the later, either admit the claim and deliver possession of the property to the claimant or send notice in the prescribed manner to the claimant that the claim is disputed, with the trustee's reasons for disputing it, and, unless the claimant appeals the trustee' decision to the court within 15 days after the sending of the notice of dispute, the claimant is deemed to have abandoned or relinquished all his or her right to or interest in the property to the trustee who may then sell or dispose of the property free of any right, title or interest of the claimant.
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> (3) The onus of establishing a claim to or in property under this section is on the claimant.
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> (4) The trustee may send notice in the prescribed manner to any person to prove his or her claim to or in property under this section, and, unless that person files with the trustee a proof of claim, in the prescribed form, within 15 days after the sending of the notice, the trustee may then, with the leave of the court, sell or dispose of the property free of any right, title or interest of that person.
>
> (5) No proceedings shall be instituted to establish a claim to, or to recover any right or interest in, any property in the possession of a bankrupt at the time of the bankruptcy, except as provided in this section.
>
> (6) Nothing in this section shall be construed as extending the rights of any person other than the trustee.

While this would not be an option in an "equalization jurisdiction" like Ontario, s. 81 of the *BIA* provided the mechanism for the wife to advance her claims in Alberta. Her Honour was of the view that the Trustee would then have to deal with the wife's matrimonial property claims before the Trustee could determine the bankrupt's estate. As the automatic stay provision in section 69.3 of the *BIA* only applied to claims "provable in bankruptcy," they would not apply to the wife's claims in the matrimonial property proceeding, and the Trustee would be forced to deal with them.

The spousal support claim could be advanced against the husband without leave of the bankruptcy court even while he was an undischarged bankrupt: *Saberi v. Saberi* (1979), 10 R.F.L. (2d) 381 (Ont. C.A.); and *Cousin v. Cousin* (2020), 47 R.F.L. (8th) 285 (Alta. Q.B.).

With respect to the ongoing child support claim, any ongoing child support payable pursuant to an order obtained *after* the date of the bankruptcy would be factored into the husband's monthly expenses when calculating his monthly surplus. However, the *enforcement* of the arrears of child support against the assets of the bankrupt would be prohibited by section 69.41(2) of the *BIA*. Enforcement of those arrears would be limited to the husband's exempt assets and the portion of the bankrupt's income in excess of any payments to the estate (but the arrears would not be wiped out by the husband's ultimate discharge).

It was clear that Rule 4.34(1) of the *Rules* stayed the wife's property claims (but not her claim for divorce) as a result of the vesting of the husband's property interests in the Trustee. But Rule 4.34(2) then set out the procedure the wife had to follow to obtain an order that her action continue. It could be done without notice to any other party.

Justice Yungwirth noted that there was no set test to apply when considering if leave should be granted to continue an action. However:

> [28] . . . A spouse should not be able to use the bankruptcy system to stall their obligation to disclose and to prevent a fulsome consideration and determination of matrimonial property entitlements. . . .
>
> [29] Families and children suffer when their family property and divorce issues remain unresolved. If there is no determination of [the wife's] property interests . . . there is a risk that those interests might be unfairly divided among [the husband's] creditors in the bankruptcy.

Her Honour decided that the wife was entitled to proceed with her divorce and matrimonial property action so that she could verify the husband's income, assets, and liabilities and then determine and enforce her support and property claims. The Trustee had the right to be involved (pursuant to s. 81 of the *BIA*) so that the division of matrimonial property could be finalized and so the Trustee could determine the property available for the creditors of the bankrupt's estate. That said, even without the Trustee's involvement, the wife could enforce her child support arrears against the husband's exempt assets. As the best interests of the children were at stake, that alone was sufficient reason to order the actions to continue.

As a result, the Court ordered that the wife's divorce and matrimonial property claims would continue.

It Was My Understanding There Would Be No Math on This Exam???

Schoff v. Schoff, 2020 CarswellSask 578 (Q.B.) - MacMillan-Brown J.

In the months to come, we are likely going to see many support cases involving self-employed payors whose incomes have been devastated by market forces that are completely beyond their control. Some of these cases will inevitably involve payors that have injected capital into a struggling business in the hopes of outlasting the pandemic, and returning to profitability when the pandemic is finally over.

In *Schoff v. Schoff*, Justice MacMillan-Brown has provided us with a primer on how to deal with cases where the viability of a previously successful business has been jeopardized solely because of market forces. While we do not necessarily agree with *all* of the conclusions she reached, her sound analytical approach to the problems can guide others in dealing with these types of cases in the future.

The parties started cohabiting in 1992, were married in 1997, and separated in 2016. They had two children together, who were both independent adults by the time of the trial in 2020.

During the marriage, the wife stayed home to raise the children, while the husband built a successful electrical business - Power Tech - that serviced the oil and gas industry in southern Saskatchewan.

The husband's income from Power Tech allowed the parties to enjoy a luxurious lifestyle that included a $1,400,000 mortgage free home, expensive cars, frequent trips, and a vacation home in Arizona.

In the second half of 2014, the bottom fell out of the oil market, and the price of oil dropped from a high of almost $110 US a barrel, to $45 a barrel. This decline devastated the oil and gas industry in Saskatchewan, and caused Power Tech's revenue to fall from more than $28 million in 2014, to just over $9 million in 2018. Power Tech also lost significant amounts of money, and as a result its retained earnings fell from a high of more than $5 million in 2015, to just under $1 million by 2018.

The husband's taxable income also fell significantly, from more than $3.5 million in 2014 and 2015, to $950,000 in 2016 and $1 million in 2017, and finally to only $235,000 in 2018. The husband and his business partner were also forced to lend significant amounts of money to the business just to allow it to meet its ongoing obligations, presumably in the hopes that the oil and gas market in Saskatchewan would recover sooner rather than later.

As the husband was self-employed and derived his income from a company over which he had control, Justice MacMillan-Brown turned to s. 18(1) of the *Child Support Guidelines* in order to calculate his income for support purposes:

> Shareholder, director or officer
>
> 18 (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include
>
> > (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or . . .

After reviewing the leading Saskatchewan cases about s. 18(1), including Justice Ryan-Froslie's (as she then was) decision in *G. (R.E.) v. G. (T.W.J.)* (2011), 6 R.F.L. (7th) 400 (Sask. Q.B.), and the Saskatchewan Court of Appeal's subsequent decisions in *Bear v. Thompson* (2014), 52 R.F.L. (7th) 257 (Sask. C.A.), and *M.H. v. A.B.* (2019), 36 R.F.L. (8th) 261 (Sask. C.A.), Justice MacMillan-Brown explained that the court's task in these types of cases is to try to "level the playing field" between a support payor who earns straightforward employment income, and a self-employed payor who has much greater control over his/her taxable income:

> [35] . . . s. 18 is the statutory mechanism by which the Court establishes parity between a party who earns straightforward employment and business income and a party who derives his or her income primarily from closely-held corporate sources. The Court levels the playing field by attributing some, all or none of the corporation's pre-tax income to a party in order to accurately reflect the income available to him or her for spousal support purposes.
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> [36] This is because, as noted by Ryan-Froslie J. in *G. (R.E.)* at para 189, "[i]t would be incongruous if two parents, operating similar businesses and generating similar incomes pay significantly different child support because one of those businesses is operated through a corporation . . . ".

Her Honour also summarized a number of key principles from the caselaw meant to help a court decide whether to attribute all or part of a company's pre-tax income, including:

> • The party who controls the company bears the burden of showing "why the entirety of the pre-tax corporate income should not be ascribed to him or her for the purposes of calculating support": *G. (R.E.)* at para. 184.
>
> • " . . . fairness and reasonableness are important and overarching considerations", and "[t]he Court must be cognizant of the financial health of the corporation": *B.J.L. v. D.B.L.*, 2018 CarswellSask 382 (Q.B.).
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> • "The Court does not embark upon a mathematical calculation by averaging prior financial years. However, the financial history of a corporation does provide a litmus test of sorts and provides a backdrop against which the corporation's financial health, or lack thereof, can be viewed": *Bear* at para. 74. [Note the difference here between Saskatchewan (the "Limited

Rule") and Ontario (the "Unlimited Rule") in *Mason v. Mason* (2016), 83 R.F.L. (7th) 1 (Ont. C.A.), where averaging and the combined use of sections 17 and 18 of the *Child Support Guidelines* is allowed.]

• " . . . attribution of pre-tax corporate income does not financially hobble a corporation because there is no requirement that the corporation must actually pay out the attributed income to the shareholder. . . . It defines the payor's income for the purposes of determining the quantum of support payable but does not mandate that support be paid from the corporation's coffers": *G. (R.E.)* at para. 190. [This reasoning is somewhat problematic, as it suggests that a court could attribute pre-tax income to a payor even if the money cannot be withdrawn without "financially hobbling" the company. To attribute $50,000 of corporate income, and to then say that the company will not be harmed because the payor need not actually withdraw it, suggests that the company might be harmed if the amount is withdrawn. In our view, that does not make sense. If the income could not be paid out without harming the company, the income should not be attributed.]

Both parties retained experts who gave evidence about the husband's income for support purposes. According to the husband's expert, the husband's income for support purposes in 2018 was only $186,000 calculated as follows:

• She started with the husband's total income on his T1 General of $236,000 (this amount included the husband's salary from Power Tech of $108,000 a year, and various other income sources that were not in dispute).

• She made the usual adjustments that are required by Schedule III of the *Guidelines* (e.g. replace taxable dividends with actual dividends, replace taxable capital gains with actual capital gains, deduct carry charges, etc.).

• She added back the $33,500 in personal benefits that the husband was receiving from Power Tech (e.g. the company was paying for personal cell phones for the husband and his family, gas, travel, etc.). She also added a gross up of $30,000 for the $33,500 in tax-free personal benefits that the husband had received from Power Tech.

• She replaced the husband's employment income from Power Tech ($108,000) with his share of the available pre-tax income for each of the three companies that made up the business. This resulted in the husband's income from Power Tech being reduced to $nil because:

a. Two of the companies had actually lost money; and

b. Although the third company earned a pre-tax income of approximately $55,000, the husband's proportionate share of those funds was not available to him because they had been earmarked to pay for a mortgage that would be coming due shortly.

In total, therefore, the husband's expert was of the view that the husband's income for support purposes in 2018 was only $186,000.

The wife's expert disagreed with the husband's expert on two main points.

First, he suggested that the husband's employment income should be increased from $108,000 a year to $250,000 a year, because that would more accurately reflect the fair market value of the services that the husband had provided to Power Tech. However, there were a number of significant problems with this argument, including that:

• There was insufficient evidence to support the wife's expert's contention that $250,000 a year was a reasonable estimate of fair market salary for someone in the husband's position;

• There was no evidence to indicate that the husband could find alternate employment that would pay him $250,000 a year; and

• There was no evidence to suggest that Power Tech could afford to pay someone $250,000 a year to do the work that the husband had been doing.

As a result, Justice MacMillan-Brown rejected the wife's expert's opinion on this point, and accepted the husband's expert's opinion that the husband's employment income of $108,000 should be replaced with Power Tech's pre-tax income of $nil.

Although we agree with her Honour that there was no basis to "pretend" that the husband could/should have earned a salary of $250,000 a year, it is not entirely clear from her reasons why she ignored the husband's $108,000 salary from Power Tech given that this money had *actually been paid* to the husband. However, we *suspect* that her Honour made this adjustment because:

> (a) Power Tech had only been able to pay its expenses, including the husband's salary, by depleting its own capital and borrowing significant amounts of money from the husband and the other shareholder (that is, the company borrowed funds from the husband to pay the husband a salary);
>
> (b) It would have been unfair to force the husband to pay support based on a salary that he had effectively paid himself from his savings (that he had loaned to the company to try to keep it afloat), particularly since the husband could not personally deduct the company's significant pre-tax losses (see. e.g. *Colivas v. Colivas*, 2017 CarswellOnt 14571 (S.C.J.) and *V.O.E. v. L.L.E.* (2018), 16 R.F.L. (8th) 390 (Alta. Q.B.) at para. 31, rev'd on other grounds 2019 CarswellAlta 1158 (C.A.), which indicate that pre-tax losses cannot be considered when calculating income under s. 18(1) of the *Guidelines*).

Second, the wife's expert opined that the husband's share of the $55,000 in pre-tax income that was earmarked to pay the mortgage on Power Tech's property should be attributed to the husband as income, because paying down the mortgage would increase the value of the company. Justice MacMillan-Brown agreed.

Respectfully, we have our doubts about this aspect of her Honour's decision. Since the company had to pay the mortgage (banks tend to frown on mortgagors simply deciding to not pay their mortgage), and as there is no information in the reasons to indicate that the company had another way to either pay off the mortgage or refinance, we do not see how these funds were actually available to pay support.

In any event, after finding that the husband's income for support purposes was $212,000 a year and the wife's income was $30,000 a year, Justice MacMillan-Brown ordered the husband to pay support at the low range of the *Spousal Support Advisory Guidelines* on an indefinite basis. She found that the low range was appropriate because the wife had received significant liquid assets from the parties' property settlement, while the husband had not.

Interestingly, even though the parties agreed that support should be reviewed, Justice MacMillan-Brown declined to order one. Although review orders should be granted sparingly (see e.g. *Leskun v. Leskun* (2006), 34 R.F.L. (6th) 1 (S.C.C.)), and while it is unclear to us why the parties thought a review was necessary or appropriate in this particular case, we are not aware of any authority for the proposition that a court can refuse to order a review after both parties have agreed to it.

The 11th Commandment: Thou Shall Not Forum Shop

Simons v. Crow (2020), 48 R.F.L. (8th) 135 (Ont. S.C.J.) - Bale J.

Justice Bale's thorough reasons in *Simons v. Crow* provide a roadmap for determining whether a court in Ontario has jurisdiction in a family law case. It also serves as a reminder that when dealing with a jurisdictional dispute, one must consider all three of the following questions:

1. Does the court have statutory jurisdiction?

2. Does the court have jurisdiction *simpliciter*?

3. Is another forum clearly more appropriate?

The parties in *Simons* were married in 1993 and had three children together. The family moved to Bermuda in 1998, and lived there together until the husband and wife separated in 2005.

The parties litigated, and ultimately resolved, the issues arising from their separation in Bermuda.

In 2008, the parties agreed that the wife and children would return to Ontario. They also agreed that the husband would be able to be able to spend approximately three months a year with the children in Ontario.

In 2018, the husband commenced a proceeding in Bermuda to reduce his child support payments because his income had decreased, and because the children were all over the age of majority and enrolled in various post-secondary programs. The mother defended the husband's claims in Bermuda, and she participated in the final hearing in March 2019.

In August 2019, the Supreme Court of Bermuda released its decision terminating the husband's child support obligation for one of the children, and reducing his support payments for the other two.

The husband also made claims in Bermuda to deal with various parenting issues. On September 25, 2019, the Bermuda court determined that although the children were already all over the age of majority (and although they had been living in Ontario since 2008), it had inherent jurisdiction because they had various disabilities and did not have capacity to make their own decisions about their custody, care, and control.

After the September 25th hearing, the mother decided she no longer wanted to participate in the proceeding in Bermuda. On November 14, 2019, she commenced an Application in Ontario for, among other things, custody of the parties' adult children, an order limiting the husband's access with the children, child support, and an order requiring the husband to maintain life insurance for the children.

Upon receiving the mother's Application, the husband retained counsel in Ontario, and brought a motion to dismiss the wife's claims on the basis that the court in Ontario lacked jurisdiction *simpliciter* or, alternatively, that it should decline to exercise its jurisdiction on the basis of *forum non conveniens*.

Statutory Jurisdiction

The wife acknowledged that she could not claim relief under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), because the parties had been divorced in Bermuda (for further discussion of the problems associated with not being able to seek relief under the *Divorce Act* once a foreign divorce has been granted, see "How Do You Solve a Problem Like *Rothgiesser*?" in the 2020-18 and 2020-19 editions of *TWFL*). However, she argued that the court had jurisdiction under the applicable provincial legislation - the *Family Law Act*, R.S.O. 1990, c. F.3 (the "*FLA*") and the *Children's Law Reform Act*, R.S.O. 1990, c. C. 12 (the "*CLRA*").

Justice Bale quickly disposed of the wife's claim for custody of the adult children because the children were already in their early 20's and, unlike the *Divorce Act*, under the *CLRA* a court can only make custody and access orders for someone who is a minor (pursuant to s. 1 of the *Age of Majority and Accountability Act*, R.S.O. 1990, c. A.7, the age of majority in Ontario is 18). Accordingly, the Court did not have jurisdiction to deal with the wife's claim for custody under the *CLRA*. And, if the wife wanted to pursue the matter, she would have to commence a new Application under the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, which deals with decision making for adults who are incapable of making decisions relating to personal care.

Jurisdiction *Simpliciter*

The more difficult question that Justice Bale had to determine was whether to permit the wife to proceed with her child support claims. Since the support payor (i.e. the husband) was not in Ontario, the wife was required to satisfy the Court that the husband or the claim had a "real and substantial connection" to Ontario (see *Jasen v. Karassik* (2009), 62 R.F.L. (6th) 63 (Ont. C.A.) at para. 16). Justice Bale explained how to determine whether an out of province support payor has a "real and substantial connection" to Ontario:

> [45] **A 'real and substantial connection' must be established on the basis of objective facts that connect the legal situation or the subject matter of the litigation with the forum. The language is deliberately general to allow for**

flexibility and evolution in application of the test: *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.), *Van Breda v. Village Resorts Ltd.*, *supra* at para. 82.

[46] The following factors have emerged as relevant in assessing 'real and substantial connection':

a. The connection between the forum and the plaintiff's claim;

b. The connection between the forum and the defendant;

c. Unfairness to the defendant in assuming jurisdiction;

d. Unfairness to the plaintiff in not assuming jurisdiction

e. The involvement of other parties to the suit;

f. The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;

g. Whether the case is interprovincial or international in nature;

h. Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere: *Muscutt v. Courcelles*, *supra* at paras. 77-110. [emphasis added]

Although some of these factors favoured the wife (e.g. the wife and the children were in Ontario and had no physical or financial connection to Bermuda), she was clearly trying to re-litigate issues that had already been decided in Bermuda only a few months earlier. After not objecting to Bermuda's jurisdiction, fully participating in the Bermuda proceeding, and not appealing the trial judge's thorough 25-page decision, Justice Bale did not think that it would be fair to essentially give the wife a "do-over" in Ontario:

[57] At the outset, it is important to note that the Judgment of Wheatley J. of the Supreme Court of Bermuda dated August 12, 2019 is Final. **The matter was commenced, litigated, and judgment was rendered before the [wife] made any objection as to forum, and before she commenced any proceedings in Ontario. This is a critical feature to the analysis**: all of the jurisprudence brought to the attention of this court pertained to competing actions in two jurisdictions wherein either: (a) the action in the foreign jurisdiction was not complete; or (b) the concluded action in the foreign jurisdiction did not consider the issues brought before the Ontario court. **This causes the court obvious concern as to a potential abuse of process**. . . . The same questions that would require judicial determination in relation to [the wife's] Ontario action were considered and have already been decided (quite recently) by the Supreme Court of Bermuda. **With some minor changes in phraseology, the decision of Stoneham J. could easily be mistaken for the decision of an experienced Ontario Superior Court of Justice judge considering a child support variation motion under the *Divorce Act* or the *FLA***. The [wife] did not object to the forum, participated fully in that hearing, and did not appeal the decision.

[58] **The [husband] appears to have participated in good faith throughout the Bermuda action**, making appropriate financial disclosure, tendering relevant evidence, and advancing his legal argument in accordance with the procedure of that court. The [husband] was represented by counsel and incurred legal expense. **He obtained judgment through proper legal channels, without objection from the [wife], and should not be required to relitigate this issue in another court without compelling reason**. Although the [husband] did not specifically argue issue estoppel, the court is alert to the need to promote finality in litigation, to avoid duplicative action which increases costs to families, and to enforce its positive obligation to promote the primary object of the *Family Law Rules*: to deal with cases justly: O. Reg. 322/13 at Rule 2. (2). [emphasis added]

It also did not help the wife that Bermuda's child support regime is similar to Ontario's, and that Bermuda is a reciprocating jurisdiction in the enforcement of child support:

> [70] In light of such significant similarities in legislation regarding entitlement to child support for children over the age of majority, and the thorough application of those similar principles to the child support issues determined by the Supreme Court of Bermuda, and raised again in these proceedings, **it would be contrary to principle and inconsistent with comity if this court were to refuse to recognize the decision of Wheatley J. as relevant, binding, and enforceable**. [emphasis added]

In the end, Justice Bale concluded that even though the wife and children lived in Ontario, the wife had not established that the case had a "real and substantial connection" to Ontario:

> [71] As explained by the Supreme Court of Canada, the real and substantial connection test permits a general and flexible application. No factor need be given more weight than any other, but there is no prohibition against finding some factors to be more influential than others. **While in normal circumstances the primary residence of the "children" and the recipient parent would weigh heavily in favour of establishing jurisdiction *simpliciter*, on the specific facts of this case, I am not satisfied that the [wife] has discharged the burden** of establishing the court's territorial competence in this matter. The strength of the factors which establish **significant prejudice to the [husband] if this matter is permitted to be (re)litigated in Ontario, and the lack of prejudice to the mother in awaiting a material change (if any) before returning this matter through the available procedure under the *Interjurisdictional Support Orders Act*, and the strong need for comity in this matter demand respect for and recognition of the existing Order of the Supreme Court of Bermuda**. In reaching this conclusion I am guided by the factual similarities and reasoning of Goodman J. in *Sun v. Guilfoile*. I adopt his comments: "Where a valid and subsisting foreign court order provides for support, there is no jurisdiction in Ontario to proceed with an originating application for support under s. 33. Such an application is nothing more than a disguised variation application": *supra*, at para. 55. There are no legitimate custody and access claim before this court which warrant a deviation from this general practice. [emphasis added]

In *Sun v. Guilfoile* (2011), 96 R.F.L. (6th) 397 (Ont. S.C.J.), Justice Goodman held that a party cannot simply get a new original order for support in successive jurisdictions. Where a valid and subsisting foreign order provides for support, there is no jurisdiction in Ontario to proceed with an originating application for support under s. 33 of the *FLA*. A foreign order is not a "nullity" and cannot just be ignored. The same theory was also upheld in *Mittoo v. Nanda* (2015), 64 R.F.L. (7th) 481 (Ont. C.J.), where the Court determined that the party had to avail itself of the *Interjurisdictional Support Orders Act, 2002*, S.O. 2002, c. 13, to vary a foreign child support order. But one cannot use an Ontario proceeding under the *FLA* to, in essence, try to vary a foreign order, and courts generally should not accept jurisdiction over support applications where there is a valid foreign order.

There is some contrary authority - *Kaur v. Guraya* (2011), 4 R.F.L. (7th) 346 (Ont. S.C.J.), for example - where the Court held that where there is a foreign order for custody and child support and an Ontario applicant tries to supersede both, the application can proceed in Ontario on the applicant's undertaking to withdraw enforcement of the foreign order. That said, we believe the authority of *Sun v. Guilfoile* is preferable, and certainly so where the Ontario application is brought literally on the heels of the foreign order.

Where claims for custody/access can proceed under s. 42 of the *CLRA* (superseding a foreign order where there has been a material change in circumstances), then it may be appropriate to accept jurisdiction over support as well: *Gavriluke v. Mainard* (2012), 32 R.F.L. (7th) 99 (Ont. S.C.J.), aff'd (2013), 32 R.F.L. (7th) 111 (Ont. Div. Ct.); *Von Pfetten v. Kocher*, 2013 CarswellOnt 18956 (S.C.J.); *Lowry v. Steinforth* (2018), 17 R.F.L. (8th) 487 (Ont. C.J.).

In case she was wrong about Ontario not having jurisdiction *simpliciter* (and we do not think she was), Justice Bale also considered whether to stay the Ontario proceeding pursuant to the doctrine of *forum non conveniens*, which permits a court to stay a proceeding on the basis that a court in another jurisdiction is clearly the more appropriate forum for dealing with the matter:

> [75] Very often there is more than one forum capable of assuming jurisdiction and it is necessary to determine where the action should be litigated. **At times, there are several equally suitable alternatives and the most appropriate forum is determined through the *forum non conveniens* doctrine, which allows a court to decline to exercise its jurisdiction**

on the ground that there is another forum more appropriate to entertain the action: *Muscutt v. Courcelles*, *supra* at para. 40.

[76] Several considerations have evolved in the determination of the most appropriate forum, including but not limited to:

a. The location of the parties;

b. The location of key witnesses and evidence;

c. Contractual provisions that specify applicable law or accord jurisdiction

d. The avoidance of multiplicity of proceedings

e. The applicable law and its weight in comparison to the factual questions to be decided;

f. Geographic factors suggesting the natural forum;

g. Whether declining jurisdiction would deprive the plaintiff of a legitimate judicial advantage available in the domestic court: *Muscutt v. Courcelles*, *supra* at para. 41, and *Jasen v. Karassik*, *supra*. [emphasis added]

Although the Bermuda proceeding was already finished, Justice Bale determined that based on these factors, if she was "wrong in finding that Ontario does not have territorial competence to hear a fresh Application for child support in this matter, the circumstances of this case weigh strongly in favour of upholding the Supreme Court of Bermuda's judgment as having already been decided in the more appropriate forum."

As a result, Justice Bale dismissed the wife's Application.

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