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Family Law Newsletters
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— Franks & Zalev - This Week in Family Law

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Contents

On a Lighter Note . . . Où est la toilette?

The Divisional Court, which is one of the two main appellate courts in Ontario, has been issuing the following direction when scheduling virtual hearings:

> Neither counsel nor the court will gown for the hearing. Instead, business attire is required for anyone with a speaking role in the hearing. **All parties shall ensure that they participate in the videoconference from appropriate surroundings and that they take reasonable steps to reduce the risk of interruption or disturbance of the hearing.** [emphasis added]

See e.g. *Dnaagdawenmag Binnoojiiyag Child and Family Services v. B.RP*, 2020 CarswellOnt 5339 (Div. Ct.).

We would have thought that this comprehensive direction was broad enough to cover any possible questions that counsel might have had about how a virtual hearing should be conducted. But based on recent events in the United States Supreme Court, it appears that the Divisional Court may have forgotten to include one critical point - bathroom breaks.

On May 6, 2020, while the Supreme Court of the United States was conducting a virtual hearing about the constitutionality of legislation prohibiting unwanted robocalls, counsel's submissions were interrupted by the loud sound of a toilet flushing.

You can't make this stuff up, and if you don't believe us, you can hear it for yourself at the following link: https://www.youtube.com/watch?v=xB0bUtTvdCU.

COVID-19 Update

We continue to update the *Epstein Cole Covid-19 Chart* weekly, and it continues to be available on Carswell through FamilySource. We have now logged more than 70 cases. It takes an incredible amount of time to track all of the Covid-19-related cases, figure out which ones add something "new" to the discussion, and to then summarize the ones that do. And for that, we offer a great deal of thanks to our students, Erica Morassutti and Victoria Ourumis and to our associate, Kristy Warren, for their time and effort in keeping the chart current and relevant.

While most of the COVID-19 family law cases to date have involved parenting issues, there have been some cases that have dealt with the financial implications of COVID-19. For example, in *Browning v. Browning*, 2020 CarswellOnt 5998 (S.C.J.), Justice Tobin recently determined that the mother's motion for child support for the parties' three children was "immediate, serious, and material" and needed to be heard on an urgent basis. Among other things, the mother had recently lost her job

because of COVID-19, she was struggling financially to meet the children's basic needs, and the father had not paid any child support voluntarily.

What we had not yet seen until now, however, was a case that dealt with the implications of COVID-19 vis-à-vis property division. That changed with *Jayawickrema v. Jayawickrema*, 2020 CarswellOnt 6052 (S.C.J.), which is the first case we have seen where COVID-19 may have an impact on how the parties' property is divided on a final basis.

The parties were married in 2012 and separated in 2015. The husband had an interest in his family's textile business in Sri Lanka, and the wife ran a successful "student education business" she had established after the parties separated.

Justice Jarvis heard the trial in *Jayawickrema* in November 2019, and reserved. By the time his Honour was ready to release his decision, it was obvious that COVID-19 had already had a devastating impact on the Canadian economy, but it was unclear what its long-term impact would be, or whether it had an impact on the actual parties to the case.

After making the necessary findings about the property issues in dispute, Justice Jarvis determined that the wife owed the husband an Equalization Payment of $66,080. However, even though neither party had actively pursued a claim for an unequal division at trial, Justice Jarvis was not prepared to order the wife to pay the Equalization Payment without giving her a chance to make submissions about whether it would be unconscionable to require her to pay the husband all or part of the Equalization Payment she owed him because of COVID-19:

> [96] Neither party affirmatively dealt with the issue of unconscionability in their evidence even though it was a trial issue. No case law was provided to the Court. The wife seems to have been oblivious to the possibility that she could be exposed to such a claim and the husband dismissed it entirely. This is especially concerning for a couple of reasons:
>
> > (a) **Since the trial concluded, the COVID-19 pandemic has decimated the global economy**. It was inferentially clear from the wife's evidence that her business involved students and, quite possibly, people in close contact with each other. **Public Health guidelines and restrictions have likely impacted the wife's ability to operate her business, pay the mortgage on its premises and thus fund any equalization payment**;
> >
> > (b) **In *Serra v. Serra*, the Court of Appeal accepted that a market-driven downward impact on a party's asset could be an appropriate "unconscionability" consideration**. In that case, the value of Mr. Serra's most significant asset (his textile business) decreased so substantially after the valuation date for reasons beyond his control that the business was worth less than the equalization payment he owed. A difference between that case and this is that Mr. Serra continued to own his business after the valuation date (but could not sell it) and the wife in this case owned realty that was sold after the valuation date and the proceeds used, in part, to fund a business likely affected by the global health and economic crisis.
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> [97] **I am not prepared to order that an equalization payment be made without further evidence and submissions from the parties**. The order below contains directions for the parties in that regard. Given my views about the parties' credibility, consideration may be given after delivery of their material to a brief oral hearing on the issue whether requiring the wife to pay the full or any part of the equalization payment would be unconscionable.

And so the testing of the bounds of *Serra* begins . . .

We will continue to monitor this case, and let you know what Justice Jarvis ultimately decides. In the meantime, it is important to keep in mind that COVID-19 is ***not*** an invitation for parties to try to argue s. 5(6) in every case where the value of an asset has declined. Although the Ontario Court of Appeal found in *Serra v. Serra* (2009), 61 R.F.L. (6th) 1 (Ont. C.A.) that a market driven post-separation decline in the value of an asset can, *in certain circumstances*, form the basis for an unequal division of property pursuant to s. 5(6) of the *Family Law Act*, it was also clear that:

- The "threshold of 'unconscionability' under s. 5(6) is exceptionally high" and "must 'shock the conscience of the court'[.]"

• When dealing with a claim for relief based on a post-separation market-driven decline in the value of an asset, "[e]ach case must be determined on its own facts", including whether "the owner of the diminishing asset could have sold it in a falling market to preserve at least some of its value", and whether it is only a "temporary decrease in the value of an asset resulting from a temporary economic recession."

• Even if s. 5(6) applies, the remedy is not just to recalculate the Equalization Payment based on the current value of diminished asset. Rather, once the "threshold [of unconscionability] has been crossed and the rare judicial discretion under the FLA is in play, the court should exercise its discretion as it normally does: by doing what is just, fair and equitable in the circumstances."

We also want to make sure you are aware of two other recent decisions that have dealt with COVID-19: Justice Myers' decision in *Arconti v. Smith*, 2020 CarswellOnt 6163 (S.C.J.), which is now the leading case on whether a party can be forced to proceed with examinations for discovery or questioning by videoconference, and Justice Kurz's thoughtful decision in *Ivens v. Ivens*, 2020 CarswellOnt 4836 (S.C.J.), where he had some pointed comments about the impact that parental conflict has on children.

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Arconti v. Smith, 2020 CarswellOnt 6163 (S.C.J.) - Myers J.

In *Arconti*, Justice Myers denied the Plaintiffs' request to adjourn a scheduled mini-trial until they were able to examine the Defendants in person. Although Justice Myers accepted that examining a witness by videoconference would "not produce perfection", it would also not be "as horrible as it is uncomfortable", and the potential problems associated with proceeding by videoconference did not warrant putting the case on hold indefinitely. In his well-written and entertaining reasons, Justice Myers offered:

> [19] In my view, **the simplest answer to this issue is, "It's 2020"**. We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. **We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back**.
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> . . . . .
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> [39] Two points are of note. First, **the great fears expressed in case law by those who have never actually used the technology may not be as significant as feared**. I agree with this view. However, I also agree with Perram J. and Mr. Bastien, that currently, it does appear that there is some loss of solemnity and personal chemistry in remote proceedings. What is not yet known however, is whether, over time, as familiarity with new processes grows, we will develop solutions to these perceived shortcomings.
>
> [40] As things stand at present, **I do not doubt that there are perceived, and possibly very real shortcomings associated with proceeding remotely rather than in person. However, in this case at least, the benefits outweigh the risks. The most obvious benefit is that litigation will not be stopped in its tracks**. [emphasis added]

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Ivens v. Ivens, 2020 CarswellOnt 4836 (S.C.J.) - Kurz J.

In *Ivens*, Justice Kurz dealt with a request by the mother in an extremely high conflict case to suspend the father's court ordered parenting time with two of the parties three children because of COVID-19 (the third child was estranged from the father).

As the mother was effectively asking for an interim variation of a final parenting order, Justice Kurz started by reviewing the test for granting that type of extraordinary relief:

> [75] In *Berta v. Berta*, 2019 ONSC 545, I reviewed a number of authorities with regard to the test for an interim variation of a final support order. I found that **the test has four components, requiring the moving party to prove**:
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> 1. A **strong *prima facie* case**;
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> 2. A **clear case of hardship**;
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> 3. **Urgency**; and
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> 4. That the moving party has come to court with **"clean hands"**.
>
> [76] The first three factors should apply to an interim variation of a parenting order. **The fourth factor applies only to the variation of a support order, not to parenting issues**. A person who deliberately refuses to obey a support order will generally not be granted the right to claim an interim variation of that order because that person comes to the court with metaphorically "unclean hands". **With regard to parenting issues, we must ensure that a parent's misconduct does not detract from the determination of the parenting issues based only on the child's best interests** (see *D.D. v. H.D.*, 2015 ONCA 409 at para. 87). [emphasis added]

After thoroughly reviewing the history of the matter, Justice Kurz dismissed the mother's motion because she failed to establish a *prima facie* case or a clear case of hardship. Furthermore, while Justice Kurz found that the motion was urgent, the urgency had nothing to do with COVID-19, or any of the other arguments that were put forward by the mother. Rather, he found that the matter was urgent because "the longer [the children] are kept away from direct contact with their father, the more likely it is that they will become as estranged to him as their brother", which would be "catastrophic for them."

After reminding the parties and the public that "[i]t is unacceptable for any parent to use this crisis as an excuse to usurp parental responsibilities to which they are not entitled", his Honour gave us one of the better quotes we've seen during the COVID-19 crisis about the horrific impact that parental conflict has on children:

> [127] **As great as the danger of COVID-19 undoubtedly is, another great danger here, as it is for many families before this court, is the virus of conflict**. Putting children in the middle of conflict, demonstrating that fighting and arguing is how adults manage their disputes, making children take sides in a lose-lose game, all corrode a child's emotional equilibrium. **Children have no special mask or protective gear that can shield them from this type of virus**. [emphasis added]

And now, again, some cases that have absolutely nothing to do with COVID-19 . . .

How Do You Solve a Problem Like *Rothgiesser*? (With apologies to the Sound of Music) - Part One of Two (to be continued next week)

The issue of recognition of foreign divorce continues to arise in some provinces because of the "Rothgiesser Rule" as it is known in Ontario - *Rothgiesser v. Rothgiesser*, 2000 CarswellOnt 50 (Ont. C.A.). At the risk of repetition, in *Rothgiesser*, the Ontario Court of Appeal held that under the *Divorce Act*, a court in Canada can only award Corollary Relief that is, in fact, corollary to a Canadian divorce. Absent a Canadian divorce, there can be no order for Corollary Relief under the *Divorce Act*. This is because of the division of powers in the *Constitution Act, 1867* (the "Constitution").

Under the Constitution, the Federal government can legislate over "marriage and divorce" [s. 91(26)], and the provinces can legislate over "property and civil rights in the province" [s. 92(13)]. In *Papp v. Papp*, 1969 CarswellOnt 963 (C.A.), the Ontario Court of Appeal held that the Federal government was only competent to legislate in the area of support and custody, which otherwise would seem to be "property and civil rights in the province", if such laws were corollary to the granting of a divorce. It is a constitutional imperative. Then, in *Rothgiesser*, the Ontario Court of Appeal clarified that support and custody orders under the *Divorce Act* must be corollary to a Canadian divorce.

As detailed in our previous commentary, other provinces are similarly situated.

The problem has been particularly acute in Ontario because, in Ontario, a "former spouse" (i.e. once a divorce has been granted) is not a "spouse" for the purposes of claiming spousal support under Ontario's *Family Law Act*.

This is why the recognition of foreign divorces matters. And the reason some spouses rush to a foreign jurisdiction to try to get divorced before an order for divorce can issue in Canada. And the reason why Canadian courts, including in the three decisions that are discussed below and in the *Newsletter* next week, have had to grapple with the question as to whether or not to "recognize" a foreign divorce.

Our apologies for the length of the *Newsletter* this week; but there is just so much to cover. To save your eyes, this week, we are going to discuss two cases, *Antonyuk v. Antonyuk*, 2020 CarswellOnt 1797 (S.C.J.), and *Zeineldin v. Elshikh*, 2020 CarswellOnt 2654 (Ont. S.C.J.), where the courts had to apply the provisions of the *Divorce Act* that deal with the recognition of foreign divorces in order to decide whether the claimants in those cases could proceed with a claim for spousal support.

Next week, we will discuss *Anderson v. Bubb*, 2020 CarswellOnt 3569 (Ont. S.C.J.), where Justice Gray came up with a clever and creative (and, on the facts of the case, correct) way of dealing with a situation to stop the potential payor from preventing the claimant spouse from pursuing her spousal support claims in Ontario by obtaining a divorce in a foreign jurisdiction.

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Antonyuk v. Antonyuk, 2020 CarswellOnt 1797 (S.C.J.) - Nakonechny J.

The only issue before Justice Nakonechny in *Antonyuk* was whether a Ukrainian divorce should be recognized in Ontario pursuant to s. 22 of the *Divorce Act*.

While the Husband had remarried (and had a 17-year-old son with his second wife), the Wife argued that the Ukrainian divorce was invalid for the following reasons:

> (a) The date of the divorce (October 1998) pre-dated the date of separation, (January 1999).
>
> (b) She had not been served with the divorce application and notices of court hearing.
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> (c) Neither party ever resided in the Vatutinsky District of Kyiv, where the divorce was granted. They did not own property in that district or have any ties to it.
>
> (d) The Husband had not been ordinarily resident of Ukraine for one year immediately before he commenced the divorce proceeding.

The Husband was born in Ukraine. The Wife was born in Russia. They were married in Kyiv, Ukraine, in 1983, and had one child, who was now 33 years old.

The parties began the process of immigrating to Canada in 1996. It took about two years, until January 1998, before they received permission to immigrate.

The Husband gave evidence that the parties lived a "separate and unhappy life" in the year before they left for Canada. He slept in the living room, and he spoke to his best friend about the problems in the relationship and the possibility of divorce. At some point, the Wife confessed to having a relationship with another person. The Husband believed the marriage was at an end.

The Husband said that they discussed getting divorced in May or June 1998, prior to their move to Canada, and that he suggested the divorce should take place in Ukraine. The parties had resided in Kyiv during their marriage, they were part owners of the apartment they lived in, and they understood the process.

Ultimately, however, the Wife told the Husband she did not agree to get divorced before they moved to Canada.

The parties and their daughter landed in Canada on June 27, 1998. While they returned their Ukrainian passports to the Ukrainian government, they each kept their international Ukrainian passports.

When the Husband returned to Ukraine on July 12, 1998, to complete work on an ongoing employment contract, he transferred funds to divide the parties' cash assets equally as part of their separation.

The Husband asserted that he was open with the Wife about his plan to commence the divorce proceeding when he returned to Ukraine. He acknowledged that the Wife did not agree to the divorce, but he told her that he was going to start the process anyways as he felt the marriage had been over for some time. The Wife, however, claimed she was unaware of the Husband's plan to proceed with the divorce when he returned to Ukraine.

In August 1998, the Husband met with a lawyer in Kyiv to complete and sign documents for the divorce. He provided the lawyer with the Wife's address for service in Toronto. He was also required to provide her last known address in Kyiv, which was the apartment where they lived before they left Ukraine.

The Husband did not send any of the documents in the divorce proceeding to the Wife as he was told by his lawyer that the Ukrainian court was required to give the Wife notice of the divorce hearing.

The divorce hearing took place on September 28, 1998 (more than ***20 years ago***), in Kyiv. The Ukrainian court ordered the dissolution of the marriage. The Ukrainian judgment confirmed that the Wife did not appear at the hearing, and that she had been informed about the date and time of the hearing on September 25 and 28, 1998. The Ukrainian court stated that, having heard from the claimant and considering the materials of the case, it was satisfied that the claim for divorce had been satisfied, and the marriage was subject to dissolution for several reasons pursuant to the applicable Ukrainian legislation.

When the Husband returned to Canada in January 1999, he gave the Wife a duplicate original of the Certificate of Divorce. He also retrieved his personal belongings from their apartment on that day.

According to the Husband, the parties then did not discuss the divorce for ***17 years***, until 2016, when the Wife told him that she needed a document that would prove the Ukrainian divorce was valid so she could get remarried in Canada. The Husband obliged.

On December 23, 2016, the Husband received an e-mail from the Wife accusing him of obtaining a false divorce certificate and giving him one month to provide a "valid Canadian divorce certificate". The e-mail went on to accuse the Husband of marrying a second woman while the two of them were still married, divorcing the second wife on the "same day after marriage to get forgery divorce certificate", taking money from their joint account to take the second wife on an expensive vacation, and not paying child support.

The Wife also told the Husband that she had retained a lawyer to commence an Application for Divorce in Canada.

The Wife denied that she knew the Husband had planned to obtain a divorce when he returned to Kyiv in July 1998, and she denied that the Husband gave her a copy of the Certificate of Divorce in January 1999. She also denied ever being served with anything from the Ukrainian court. She claimed she had no notice of the hearing, and no opportunity to attend and oppose the divorce.

The Husband called an expert witness about the internal law of Ukraine. After citing the relevant legislation, the expert confirmed that:

> (a) In Ukraine, one party is permitted to apply for the dissolution of the marriage without the other spouse's consent. They must prove to the court that further living as a couple and family preservation is impossible.

(b) Cases of disputes in family relationships are to be considered by local general courts as happened in this case.

(c) The general rule is that a lawsuit is filed with the court at the defendant's place of residence. However, if the defendant has no place of residence in Ukraine, the court has discretion to permit claims for marriage dissolution to be filed in the place of the claimant's residence.

The expert explained that the question of jurisdiction is considered by the court when it receives a divorce application. The court, at that time, decides whether to accept the application for hearing and gives reasons for its decision. These reasons would have formed part of the court file (although in this case the actual court file had apparently been destroyed in 2010).

The expert also confirmed that Ukrainian legislation and rules do not expressly recognize the violation of rules of territorial jurisdiction as an unconditional ground of appeal, and opined that the court must have approved the jurisdiction at the application stage before it allowed the case to be heard.

It was the expert's unchallenged opinion that the Ukrainian court had the jurisdiction to dissolve the parties' marriage. The Husband had satisfied the grounds for divorce required under Ukrainian law, and had taken all of the necessary procedural steps to obtain the divorce.

Justice Nakonechny considered s. 22 of the *Divorce Act*, which enables a court in Canada to recognize a foreign divorce on three bases:

Recognition of foreign divorce

22(1) A divorce granted, on or after the coming into force of this Act, pursuant to a law of a country or subdivision of a country other than Canada by a tribunal or other authority having jurisdiction to do so shall be recognized for all purposes of determining the marital status in Canada of any person, if either former spouse was ordinarily resident in that country or subdivision for at least one year immediately preceding the commencement of proceedings for the divorce.

(2) A divorce granted, after July 1, 1968, pursuant to a law of a country or subdivision of a country other than Canada by a tribunal or other authority having jurisdiction to do so, on the basis of the domicile of the wife in that country or subdivision determined as if she were unmarried and, if she was a minor, as if she had attained the age of majority, shall be recognized for all purposes of determining the marital status in Canada of any person.

(3) Nothing in this section abrogates or derogates from any other rule of law respecting the recognition of divorces granted otherwise than under this Act.

To avoid the problem of "limping marriages", her Honour correctly reminded herself of the fact that foreign divorce decrees are presumptively valid, and that the onus is on the party challenging the validity of the divorce to convince the court that it should not be recognized in Ontario: *Essa v. Mekawi* (2014), 56 R.F.L. (7th) 133 (Ont. S.C.J.). See also *Powell v. Cockburn* (1976), 22 R.F.L. 155 (S.C.C.) and *Ho v. Lau* (2019), 32 R.F.L. (8th) 292 (Ont. Div. Ct.).

Subsection 22(3) of the *Divorce Act*, above, allows the court to use private international conflict of law principles and the common law to recognize a foreign divorce. In *Wilson v. Kovalev* (2016), 72 R.F.L. (7th) 362 (Ont. S.C.J.), Justice Chappel summarized the law and held that:

[10] At common law, there are presumptions in favour of the validity of a foreign divorce decree. Accordingly, there is an onus on a party alleging that the divorce is invalid to adduce some evidence to establish that the divorce was not properly obtained [. . .]. The grounds upon which the court will decline to recognize a foreign divorce are very limited, and include the following:

1. The Respondent did not receive notice of the Divorce Application;

2. The foreign divorce decree is contrary to Canadian public policy;

3. The foreign court or other authority that granted the divorce ("the granting authority") did not have the jurisdiction to do so under the law of the foreign country;

4. Where there is evidence of fraud going to the jurisdiction of the granting authority;

5. There was a denial of natural justice by the granting authority in making the divorce order.

. . . . .

[11] By contrast, there are numerous bases upon which Ontario courts will recognize a divorce obtained in a foreign country, including the following:

1. The parties were domiciled in the foreign country that granted the divorce ("the granting country") when the divorce proceedings were commenced;

2. Either party was domiciled in the granting country when the divorce order was made;

3. The divorce, wherever granted, would be recognized by the law of the country where the parties were domiciled when the divorce order was made;

4. The jurisdictional rule of the granting country corresponds to the Canadian jurisdictional rule in divorce proceedings;

5. Where either party had a real and substantial connection with the granting country;

6. Where the foreign divorce would be recognized in another foreign jurisdiction with which either party has a real and substantial connection.

In this case, both parties were Ukrainian citizens at the time the divorce proceeding was commenced in Ukraine. And, as a citizen, the Husband had the right to commence a divorce proceeding in Ukraine. Justice Nakonechny also accepted the expert's opinion that Ukrainian law does not require a one-year separation period, or any specific period of separation, before granting a divorce.

Furthermore, although Ukrainian law does not use the term "ordinarily resident": the Husband had lived in Ukraine from birth; the parties resided in Ukraine during their 15-year marriage; and the parties had owned, and continued to own, property there. Therefore, they both had a real and substantial connection to Ukraine.

With respect to the Wife's suggestion that she had not been given notice of the divorce hearing, Justice Nakonechny made two points:

a. The Ukrainian divorce order stated that the Wife was informed of the divorce hearing on September 25 and 28, 1998. The Ukrainian court was, therefore, satisfied that the proper steps were taken to give the Wife notice before it made its decision. The Ukrainian court had discretion under the internal law of Ukraine to hear the matter in the Wife's absence.

b. A court in Ontario had no jurisdiction to inquire whether a foreign court had erred in applying its own law absent an allegation of fraud ***going to the basis of its jurisdiction***.

Her Honour did not expand on the second point because the Wife did not actually allege fraud. In any case, it is a correct statement of the law. Generally, a party can only look to impeach a foreign divorce based on an alleged fraud if the foreign court took jurisdiction on the basis of facts which, if the truth were known, would not have given it jurisdiction. While it may be "distasteful", for reasons of comity Canadian courts will generally not inquire into fraud that goes to the merits: *Powell v.*

Cockburn (1976), 22 R.F.L. 155 (S.C.C.); *Okmyansky v. Okmyansky*, 2005 CarswellOnt 4939 (S.C.J.); and *Cabaniss v. Cabaniss* (2010), 88 R.F.L. (6th) 305 (B.C. C.A.). That being said, the ability to set aside a foreign judgment for fraud that goes to the merits may have been incrementally expanded in *Beals v. Saldanha*, 2003 CarswellOnt 5102 (S.C.C.).

Justice Nakonechny also found that it would not be contrary to Canadian public policy to recognize the divorce. She specifically found that the Husband did not obtain the divorce in Ukraine to evade his legal obligations in Ontario (the Wife never even brought a claim for any family law relief against the Husband until she commenced an Application for a divorce in Ontario in March 2017). Furthermore, it would have resulted in serious unfairness to the Husband, his second wife, and the child of his second marriage, to find that the second marriage was invalid because of a prior subsisting marriage. Clearly, in this instance, the equities lay with the Husband.

Her Honour then very briefly noted that the Wife might also be barred by laches from contesting the foreign divorce. In *Downton v. Royal Trust Co.* (1972), 15 R.F.L. 43 (S.C.C.), the Supreme Court of Canada held that a person may be precluded from attacking the validity of a foreign divorce if it would be inequitable in the circumstances for him or her to do so. One of these circumstances may be where a party has waited an unreasonably long time before attacking the divorce and the other party has remarried in the meantime. See also *Ho v. Lau* (2019), 32 R.F.L. (8th) 292 (Ont. Div. Ct.).

As a result, Justice Nakonechny, quite properly in our view, found that the Wife had not met her onus of proving that the Ukrainian divorce should not be recognized in Canada.

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Zeineldin v. Elshikh, 2020 CarswellOnt 2654 (S.C.J.) - Engelking J.

This case involved a motion by the Mother for temporary relief in the context of the Father's application to have Ontario decline jurisdiction, to have the children returned to Egypt pursuant to an Egyptian court order, and to have the police assist in locating and apprehending the children.

The Wife claimed interim child support, spousal support, and $10,000 for interim disbursements. The questions before the Court, therefore, were:

1. Did the court have the authority to order interim, without prejudice, child support pursuant to the *Family Law Act*?

2. Did the court have authority to order interim, without prejudice, spousal support pursuant to either the *Divorce Act* or the *Family Law Act*?

3. If the court had authority to order interim, without prejudice, child or spousal support, what quantum of support should be paid?

4. Was an order for interim disbursements appropriate?

It is only the first two questions that inform our comments below.

The parties were married in Egypt in 2004. The Husband had Canadian and Egyptian citizenship. The Wife had Qatari and Egyptian citizenship, and was a permanent resident of Canada. There were two children, one 14 and one 9. One was born in Ontario and one was born in the United Arab Emirates (the "UAE"), but both children had Canadian and Egyptian citizenship.

The parties lived in Ontario from September 2005 to August of 2007, and then in Boston, Massachusetts until August 2008. They then relocated to the UAE, and lived there as a family from August of 2008 to July of 2018, except for about eight months in 2012-13.

The Husband was a professor in Abu Dhabi. In August of 2016, he was appointed the Department Head of Electrical and Computer Engineering at the Masdar Institute.

The parties went to Cairo for an annual summer vacation, as was their custom, in or about July of 2018. The Husband returned to work in the UAE, while the Wife stayed in Cairo with the children. The Husband returned to Egypt periodically. During this period, the Wife told the Husband that she wanted to divorce, but the Husband would not consent.

The wife left Egypt for Canada with the children on October 17, 2018, and settled in Ottawa, Ontario. The Husband did not consent to the Wife taking the children to Ontario.

On November 15, 2018, *the Wife* made an application in Egypt for a "Khul" divorce. This would allow her to obtain a divorce despite the Husband's objections, but would require her to give up all claims for spousal support and property, and return her dowry. The Wife returned to Egypt twice to deal with her divorce, once in early March and again in April of 2019, and her divorce was granted by the Egyptian court on April 23, 2019. There was no provision for child support in the divorce.

Although the Husband suspected the children were in Canada, he only learned that they were in Ottawa in June of 2019. He filed an emergency motion seeking an Order that police locate the children and return them to his care, so that he could return them to Egypt. A temporary without prejudice order was granted that the children would remain in the Wife's care, but would also have visits with the Husband. A trial was scheduled to take place in late 2019 to determine the issues of jurisdiction and the return of the children. However, the Father requested an adjournment as his work would not permit him to travel to Ottawa at that time. The Wife consented to the adjournment, but asked for temporary relief because of the delay.

Issue 1: Did the Ontario court have authority to grant interim child support?

Justice Engelking started by considering the Ontario Court of Appeal's decision in *Cheng v. Liu* (2017), 94 R.F.L. (7th) 23 (Ont. C.A.), where the Court held at paragraph 30 that: "Simply put, there is no jurisdiction for an Ontario court to grant corollary relief under the *Divorce Act* after a foreign court has validly issued a divorce."

The Wife, quite properly, did not submit that it was open to her to seek spousal support under the *Family Law Act* if the foreign divorce was valid. As Justice Hourigan noted in *Cheng*, "there is no provision in the *Family Law Act* that entitles a former spouse to claim support under that Act." Instead, the Wife claimed that: (a) spousal support was available to her under the *Divorce Act* or the *Family Law Act* if her Egyptian divorce was not valid; (b) child support was available to her under the *Divorce Act* if her Egyptian divorce was not valid; and (c) child support was available to her under the *Family Law Act* if the Egyptian divorce was valid because it did not deal with child support: *Cheng v. Liu*, *supra*.

With respect to child support, in *Cheng* the Court of Appeal found that there is no statutory prohibition against claiming child support under the *Family Law Act* after a foreign court has granted a valid divorce that does *not* deal with child support. The Court also found that "the use of the *Family Law Act* to provide a remedy is entirely consistent with the statuary objective of ensuring that parents provide support for their dependent children."

The Husband argued that *Cheng* should be distinguished because the Chinese court in that case specifically held that the support issues could more properly be dealt with in Ontario. But that did not convince Justice Engelking. Rather, her Honour found (correctly, in our view) that *Cheng* stands for the proposition that where child support has *not* been dealt with in a validly issued foreign divorce, it can properly be claimed under the *Family Law Act* by a party who resides in Ontario, and it does not matter whether the foreign court has prescribed that s/he can do so. The "prescription" of the foreign court is irrelevant.

The Husband submitted that he had not attorned to the Ontario court's jurisdiction. This raised an interesting issue, since the Husband brought his own application in Ontario to have the children returned to Egypt, and obtained interim relief for in-person and Skype access with the children. Relying on *Cawdrey v. Cawdrey*, 2011 CarswellOnt 815 (S.C.J.), Justice Engelking determined that it would be "anomalous that one would be able to seek the assistance of this court on one's application, under the *Hague Convention* but be entitled to deny having submitted to the court on a claim brought in response to that application."

This raises some concern. First, this was not a *Hague* case. Second, we are not fans of the line of thinking in *Cawdrey*. With respect, what is anomalous is finding that a party has attorned to the Ontario court's jurisdiction simply by seeking its assistance

to have his/her children returned, or to be able to see them until the request for their return has been decided. What else can a parent in those circumstances do? How is that fair?

The Husband also argued that s. 22(3) of the *Children's Law Reform Act* applied, and that the Ontario court could not exercise jurisdiction and order the interim relief the Wife had requested as her unilateral removal of the children from Egypt did not change their habitual residence. The Husband further submitted that child support could not or should not be dealt with separately from custody, and that pursuant to section 22(3) of the *Children's Law Reform Act*, the Ontario court had no jurisdiction over custody.

Similar to the jurisdiction provisions in other provincial statutes, s. 22 of the *Children's Law Reform Act* states:

> **Jurisdiction**
>
> **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. R.S.O. 1990, c. C.12, s. 22(1).
>
> **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. R.S.O. 1990, c. C.12, s. 22(2); 2016, c. 23, s. 6.
>
> **Abduction**
>
> (3) The removal or withholding of a child without the consent of the person having custody of the child does not alter the habitual residence of the child unless there has been acquiescence or undue delay in commencing due process by the person from whom the child is removed or withheld. R.S.O. 1990, c. C.12, s. 22(3).

Her Honour found that there were three specific problems with the Husband's argument:

1. Her Honour was not certain (based on the record before her) whether the children's habitual residence had been in Egypt. Respectfully, however, on the facts of the case, it seems that Egypt was the children's only possible habitual residence given that: (a) they were in school there, at least for a brief time; and (b) because of s. 22(2), it would appear that they were not habitually resident in Ontario.

2. Subsection 22(2) permits the court to exercise jurisdiction over a child even if s/he is not habitually resident in Ontario, if the child is physically present in Ontario at the commencement of the application and the other criteria in the section are met. In this case:

a. The children were present in Ontario at the commencement of the application;

b. There was likely substantial evidence in Ontario as to their best interests;

c. There was no application pending in a foreign jurisdiction (in that the divorce proceedings in Egypt are completed); and

d. The children had a real and substantial connection with Ontario.

(Although the balance of convenience is a listed factor in s. 22(1)(b)(vi), this factor was not discussed.)

3. The Husband had already obtained interim relief from the Ontario Court.

Accordingly, Justice Engelking found that whether or not the Egyptian divorce was valid, she had jurisdiction to make an order for interim child support pursuant to ss. 33 and 34 of the *Family Law Act*. Respectfully, however, since the *Children's Law Reform Act* has nothing to do with child support, and given what the Ontario Court of Appeal had to say in *Cheng*, the Court did not actually have to consider s. 22 of the *Children's Law Reform Act*. The only questions it had to address were:

1. Was there a real and substantial connection between the Wife's claim for child support and Ontario; and, if so,

2. Did the foreign court deal with the issue of child support?

Issue #2: Did the Ontario court have authority to grant interim spousal support?

The only way that the Ontario Court would have jurisdiction to make a temporary order for spousal support was if the Egyptian divorce order was not recognized in Canada.

Section 22 of the *Divorce Act* provides as follows:

22. **RECOGNITION OF A FOREIGN DIVORCE** - (1) A divorce granted, on or after the coming into force of this Act, pursuant to a law of a?country or subdivision of a country other than Canada by a tribunal or other authority having jurisdiction to do so shall be recognized for all purposes of determining the martial status in Canada of any person, if either former spouse was ordinarily resident in that country or subdivision for at least one year immediately preceding the commencement of proceedings for divorce.

IDEM - (2) A divorce granted, after July 1, 1968, pursuant to a law of a country or subdivision of a country other than Canada by a tribunal or other authority having jurisdiction to do so, on the basis of the domicile of the wife in that country or subdivision determined as if she were unmarried and, if she was a minor, as if she attained the age of majority, shall be recognized for all purposes of determining the martial status in Canada of any person.

OTHER RECOGNITION RULES PRESERVED - (3) Nothing in this section abrogates or derogates from any other rule of law respecting the recognition of divorces granted otherwise than under this Act.

As noted above, the divorce proceeding in Egypt was commenced by ***the Wife*** in November of 2018, one month after she had arrived in Ontario with the children. Therefore, her Honour found that the Wife had not been ordinarily resident in Egypt when she commenced the Egyptian divorce proceeding. Her Honour then noted that, prior to the Wife's arrival in Canada, she had been visiting both her own parents (who owned property in Egypt but were not residents) and the Husband's parents in Cairo, as they did every summer. Accordingly, she had also not been ordinarily resident in Egypt for at least one year when she commenced the divorce proceeding there.

The Husband was still teaching in the UAE in the fall of 2018. In the summer of 2018, the Husband went back and forth between Cairo and Abu Dhabi as part of the family visit. Therefore, according to Justice Engelking, the Husband was also "clearly" not ordinarily resident in Egypt for at least one year at the commencement of the divorce proceedings.

As is often the case, however, the outcome of this case turned on s. 22(3), and the question became whether the Egyptian divorce should be recognized pursuant to that provision of the *Divorce Act*.

In *Al Sabki v. Al Jajeh* (2019), 32 R.F.L. (8th) 303 (Ont. S.C.J.) Justice Audet properly determined that s. 22(3) of the *Divorce Act*, "allows the court to recognize a foreign divorce based on the principles of conflicts of laws and rules of common law." Justice Audet further found that:

> [14] Canadian courts will recognize a foreign divorce in the following situations:
>
> (i) Where jurisdiction was assumed on the basis of the domicile of the spouses;
>
> (ii) Where the foreign divorce, though granted on a non-domiciliary jurisdictional basis, is recognized by the law of the domicile of the parties;
>
> (iii) Where the foreign jurisdictional rule corresponds to the Canadian jurisdictional rule in divorce proceedings;
>
> (iv) Where the circumstances in the foreign jurisdiction would have conferred jurisdiction on a Canadian court had they occurred in Canada;
>
> (v) **Where the petitioner or respondent had a real and substantial connection with the foreign jurisdiction wherein the divorce was granted**; or
>
> (vi) Where the foreign divorce is recognised in another foreign jurisdiction with which the petitioner or respondent has a real and substantial connection. [emphasis added]

On the other hand, a Canadian court may refuse to recognize a foreign divorce that would otherwise be valid, on the grounds of fraud, the denial of natural justice, or public policy: *Wilson v. Kovalev* (2016), 72 R.F.L. (7th) 362 (Ont. S.C.J.); *Beals v. Saldanha*, 2003 CarswellOnt 5101 (S.C.C.); and *Kadri v. Kadri* (2015), 59 R.F.L. (7th) 187 (Ont. S.C.J.).

Her Honour found that neither party had provided evidence that would permit the court to conclude that the criteria outlined by Justice Audet in *Al Sabki* had been met. Justice Engelking noted that she received no evidence, for example, that the laws of Egypt or the UAE would have recognized a foreign divorce granted on a non-domiciliary jurisdictional basis. Similarly, she noted that no evidence had been led about whether the law of Egypt corresponded to Canadian jurisdictional rules in divorce proceedings. Therefore, her Honour determined that, at the time of the granting of the divorce, she could not find that either party had a "real and substantial connection" to Egypt. Specifically, she stated that:

> [21] I do not find that "the mere fact that the parties" extended families continue to reside in that country, and that the parties visit them once every year or ever second year, is sufficient to give rise to the "significant" connection necessary to ground jurisdiction.

The Wife then submitted that since the criteria required in s. 22 of the *Divorce Act* could not be proven, the foreign divorce could not be recognized for the purposes of determining the parties' marital status in Canada.

There is, of course, one glaring problem here: the ***Wife*** commenced the divorce proceeding in Egypt. She was the one to submit to the Egyptian Court that it had the jurisdiction and authority to dissolve the marriage. She may even have relied on the divorce order. How can she now be permitted to resile from the representations she made to the Court in Egypt?

As we discussed in *Antonyuk*, above, there is a presumption that a foreign divorce is valid, and it is up to the party contesting the foreign divorce to prove that it should not be valid in Canada. Here, not only did the Court reverse that onus, but it allowed the Wife to, at best, take advantage of her own fraud. Furthermore, as we also discussed in *Antonyuk*, above, it is only fraud that goes to the root of jurisdiction that can be used by a Canadian court to try to avoid a foreign divorce. So, again, the Wife must rely on her own fraud.

This would seem to be a situation for the application of the "Preclusion Doctrine" (all from *Downton v. Royal Trust Co.* (1972), 15 R.F.L. 43 (S.C.C.):

a. One cannot rely on the fact of divorce in one jurisdiction and deny in another

b. Having chosen the forum, one is estopped from challenging the forum.

c. A person may be precluded from attacking the validity of a foreign divorce if, under the circumstances, it would be inequitable for them to do so.

In any case, at least at the interim stage, the Egyptian divorce was not recognized, and Justice Engelking found that the Wife was not barred from claiming - and the Court not barred from awarding - interim spousal support under the *Family Law Act*. However, we further note that if her Honour is correct, and the Egyptian divorce is not recognized in Canada, the Wife would also be free to claim support under the *Divorce Act*.

We will have to wait to see what happens at trial.

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