CITATION: 2018 ONSC 3752
OSHAWA COURT FILE NO.: FC-2086
DATE: 20180615

CORRECTED DATE: 20180625

ONTARIO

SUPERIOR COURT OF JUSTICE

FAMILY COURT

BETWEEN:	
SIOBHAN CHRISTINA MORAN Applicant	L. M. Yates, for the Applicant
– and –	
FELIX JAMES ARTHUR CHURCHILL Respondent	S. Richard, for the Respondent

HEARD: **April 5, 2018**

MOTION DECISION

CORRECTED ENDORSEMENT – The text of the original Decision has been corrected on June 25, 2018 and the description is attached

L. E. FRYER, J.

I. Introduction

[1] I heard a motion on April 5, 2018. The primary issue on the motion was the determination of the appropriate jurisdiction: Ontario or Arizona.

II. Background

[2] The facts necessary to determine this motion are not contentious.

1. Family Background

[3] The parties are both Canadian citizens. They married in Ontario on January 5, 2013. They moved to Charlotte, North Carolina shortly thereafter as the Respondent (Father) obtained employment there.

[4] The two children of the marriage: Elodie Charlotte Churchill (born December 3, 2014) and Declan Patrick Churchill (born April 4, 2017) were both born in North Carolina.

[5] In or around August 2017, the Father obtained a new job and the family moved to Arizona.

[6] On or about October 28, 2017, the parties separated when the Father disclosed that he was involved with another woman and he intended to pursue that relationship.

[7] With the consent of the Father, the Applicant (Mother) moved with the children to Pickering, Ontario where her parents reside. She intends to permanently reside in Ontario with the children.

[8] The Father maintains an apartment in Toronto; his girlfriend also lives in Toronto.

2. Procedural Background

[9] The Mother commenced this Application in this court (the "Ontario Court") on December 21, 2017. She sought a divorce and corollary relief including child and spousal support.

[10] On January 17, 2018, the Father filed in the Superior Court of the State of Arizona, in Maricopa County (the "Arizona Court"), the following: (1) a Petition for Dissolution of Non-Covenant Marriage, seeking an order dissolving the marriage and, among other things, a declaratory judgement that "neither party is in need of or qualifies for an award of spousal maintenance" (the "Arizona Divorce Petition"); and (2) an Expedited Motion for Temporary Orders Re: Relocation of Children Back to Arizona, Legal Decision-Making, Parenting Time, Child Support, and Use of Marital Home (the "Expedited Motion").

[11] On March 5, 2018, the Mother filed a Verified Motion to Dismiss for Lack of Jurisdiction in the Arizona Court (the "Verified Motion").

[12] On March 15, 2018, the Father brought a motion in Ontario seeking, among other things, an order striking all claims made in the Application and staying all claims made by the Mother under the *Family Law Act*, R.S.O. 1990, c. F.3 (the "*FLA*"), as they relate to property, spousal support, and child support. On March 28, 2018, the

Mother withdrew her Ontario claim for divorce and conceded that Ontario has no jurisdiction to determine a divorce.

[13] On April 19, 2018, Judge Hopkins of the Arizona Court ruled on the issue of the Arizona Court's jurisdiction. Judge Hopkins determined that the Arizona Court (a) lacked jurisdiction to address child related issues, namely legal decision making authority, parenting time, or child support and (b) has jurisdiction to address all other aspects of the Father's divorce petition, including the claim for "spousal maintenance" (i.e. spousal support). Judge Hopkins dismissed the Mother's Verified Motion to Dismiss for Lack of Jurisdiction and thereby denied the Mother's request for dismissal and transfer of the case from Arizona to Ontario pursuant to the doctrine of *forum non conveniens.*

[14] As of the date of this decision, the Arizona Court has not ruled on the Divorce Petition, but it is likely to do so in the near future[1].

III. Issues & Analysis

1. Jurisdiction Generally

[15] The Supreme Court of Canada set out a two part test for the determination of jurisdiction in the case of *Club Resorts Ltd. v. Van Breda,* 2012 SCC 17, [2012] 1 S.C.R. 572 ("*Van Breda*"): the first step is for the court to determine *jurisdiction simplicter*, namely whether the case appears to fall within the jurisdiction of the court. If the answer to the first question is in the affirmative, the court must determine, pursuant to the doctrine of *forum non conveniens,* namely whether to decline jurisdiction in favour of another more appropriate forum elsewhere: *Van Breda*, at paras. 66-81.

2. Jurisdiction over Custody, Access & Child Support

[16] The parties did not dispute that Ontario was the appropriate jurisdiction to deal with the custody and access issues pursuant to s. 22(1)(a) or s. 22(2)(b) of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12. See also *Naeli v. Ghaeinizadeh,* 2013 ONCA 2, at para. 19. After this motion was argued, the Arizona Court ruled that it does not have jurisdiction over "child related issues".

[17] Nor was it seriously disputed that Ontario had jurisdiction to adjudicate the issue of child support pursuant to the *FLA* after the Arizona Court clarified that it had declined jurisdiction over this issue as well. See *Van Breda*, at para. 103, and *Cheng v. Liu*, 2017 ONCA 104, 136 O.R. (3d) 172.

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[1] Parties may be divorced after a separation of 90 days.

3. Jurisdiction over Spousal Support

[18] The Mother sought spousal support under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), and under the *FLA*. The Father submits that Arizona is the appropriate jurisdiction to deal with spousal support and the Arizona Court has signalled that it has such jurisdiction.

[19] To put the issue in context for the parties, in the opinion of one Arizona counsel, the low end of the range for alimony in Arizona could be roughly $2,000 per month whereas the low end of the range of the *Spousal Support Advisory Guidelines* is roughly $12,000 per month based on the Father's income of approximately $600,000 CAD.

(i) *Jurisdiction Simplicter*

[20] It is clear that the Mother cannot pursue spousal support under the *Divorce Act* in this court. The claim for spousal support is corollary to the divorce; as this court does not have jurisdiction over the divorce, it cannot consider the corollary relief claims: *Okmyansky v. Okmyansky*, 2007 ONCA 427, 86 O.R. (3d) 587, at para. 38.

[21] The case is not so clear with respect to jurisdiction for spousal support claimed pursuant to s. 33 (1) of the *FLA*. The *FLA* does not address jurisdiction with respect to spousal support; therefore resort must be had to the common law test set out in *Van Breda* and in addressed in the family law context in *Knowles v. Lindstrom*, 2014 ONCA 116, 118 O.R. (3d) 763 (C.A.).The Father was properly served with the Mother's application both in Ontario and in Arizona pursuant to the Convention on the *Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters*, 15 November 1965, 658 U.N.T.S. 163, C.T.S. 1989/2 (the "Hague Service Convention"). However, this does not necessarily dispose of the issue; it is necessary to determine "whether a real and substantial connection exists between the forum, the subject matter of the litigation and the defendant": *Van Breda*, at para. 99.

[22] The parties met in January 2010 while both were residing in Toronto. When they met, the Mother was working at Imagine Canada earning approximately $42,000 annually, and the Father was working at Just Energy, earning approximately $100,000 annually. The parties lived together for two years until July 2011, when the Father relocated to Charlotte, North Carolina for work.

[23] The parties married in Toronto on January 5, 2013. Upon marrying, the Mother relocated to join Father in North Carolina, where the children were born. In April 2016, the parties both became United States permanent residents. The Father's employment in North Carolina ended some time in 2017. The family then stayed in Canada from late July 2017 to August 17, 2017. The Father found new employment in Scottsdale, Arizona and on August 17, 2017, the Mother and children moved to Arizona, where the Father was already living and working.

[24] On October 28, 2017, the Father informed the applicant that he had been involved in an extra-marital affair with a woman living in Toronto. The parties separated on the

next day, namely October 29, 2017. With the consent of the Father, the Mother and children moved to Pickering, Ontario, where they have resided since the date of separation. The Father maintains an apartment in Toronto and since November 2017, he has travelled to Toronto to see the children and to see a new girlfriend.

[25] The parties own a home in Arizona. Much of their other family property is located in North Carolina.

[26] Ordinary residence can be considered a presumptive connecting factor for the purposes of determining *jurisdiction simpliciter.*

[27] In *Parrish v. Navarro,* 2014 ONSC 3222, 45 R.F.L. (7th) 385, aff'd 2014 ONCA 856, 52 R.F.L. (7th) 76, the court held at para. 49: "the issue of support for that child is most closely connected to his needs and requirements where he lives, in Ontario." See also *Jung v. Jung*, 2016 ONSC 3020, 84 R.F.L. (7th) 181.

[28] In "family law, a real and substantial connection with a jurisdiction can be found on the basis of not just the respondent's relationship with a place. This is particularly so where an allegedly dependent party resides in one jurisdiction and the other party lives somewhere else": *Knowles v. Lindstrom*, 2013 ONSC 2818, at para. 39.

[29] In this case the family had been residing in North Carolina for most of their married life and for the lives of the children. When they separated they were living together in Arizona albeit for only a brief period of time. In *MacPherson v. MacPherson* (1976), 13 O.R. (2d) 233 (C.A.) the Court of Appeal held that "the arrival of a person in a new locality with the intention of making a home in that locality for an indefinite period makes that person ordinarily resident in that community": at para. 239. Immediately after separation, the Mother moved with the children to Ontario with the consent of the Father and there was no evidence to suggest nor was it submitted by the Father that this was other than a permanent move.

[30] The Court of Appeal in *Knowles* did not specifically opine on whether "ordinary residence" at the time of application, as opposed to the time of separation, is sufficient to ground jurisdiction: at para. 35. However, the Court held at paragraph 38 that:

> Support claims are arguably quite different from tort or contract claims in that, absent appropriate support from the former partner, the burden of support may fall on the state where the party seeking support resides. As stressed in *Van Breda*, the list of presumptive connecting factors depends, in part, on the subject matter of the litigation. It follows that the factors may vary depending on the nature of the claim. [Emphasis added]

[31] Even though the Father may not have his ordinary residence in Ontario, he still has a real and substantial connection to this forum: he is a Canadian citizen, his children

reside in Ontario, his girlfriend and her child live here, he maintains a residence in Toronto and he travels to Ontario regularly.

[32] I am satisfied that the fact that the Mother and the children were ordinarily and permanently resident in Ontario at the time of the application and that with respect to the subject matter in question namely her spousal support claim that this constitutes a presumptive connecting factor in this case.

[33] Furthermore, the issue of spousal support—one of the *subject matters* of the litigation—is connected not only to the needs of the Mother but also to the needs of the children who are in her primary care. The fact that this court already has jurisdiction over the parenting and child support claims in of itself also constitutes a real and substantial connection for the purpose of jurisdiction over spousal support as well.

[34] A single presumptive connecting factor is sufficient to establish jurisdiction under the *Van Breda* analysis: *Knowles*, at para. 24.

[35] For all of the foregoing reasons, I find that Ontario has *jurisdiction simplicter* over the issue of spousal support *at this time.*

[36] Part II of the *FLA* does not explicitly refer to a "former spouse" unlike other parts of that *Act*, such as Part I (Property Division) in which a former spouse is entitled to advance a claim. A former spouse is not entitled to seek spousal support pursuant to the *FLA*: *Okmyansky*, at para. 42, citing *Rothgeisser v. Rothgeisser* (2000), 46 O.R. (3d) 577, at para. 26.

[37] A question arose during submissions as to when the definition of spouse is determined: at the time of application or at the time of adjudication.

[38] A similar fact scenario to the one at bar was before Justice Price in *Stefanou v. Stefanou* (2008), 50 R.F.L. (6th) 345 (Ont. S.C.). In that case the husband commenced a divorce petition in Greece. Before the divorce was granted by the court in Greece, the wife commenced a claim for spousal support and other relief under the *FLA*[2]. The Greek court granted the divorce before the spousal support claim was adjudicated in Ontario.

[39] Price J. reviewed *Okmyansky* and *Rothgeisser* but noted that unlike in those two cases, Mrs. Stefanou's claim for spousal support was brought before the divorce had been granted. Price J. states, at para. 61: "This raises the question of whether the operative time for determining jurisdiction is when the application is first made or when a court hears and determines the claim."

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[2] In my view nothing turns on the fact in this case that the Applicant's legal proceeding in Ontario was started prior to the Respondent's in Arizona.

[40] Price J. also considered *Nicholas v. Nicholas*, 1995 CarswellOnt 4286 (Ont. C.J. (Gen. Div.)) aff'd at (1996), 94 O.A.C. 21 (Ont. C.A.). In *Nicholas* the husband commenced divorce proceedings in Trinidad and one month later the wife commenced proceedings for a divorce including corollary relief in Ontario. The lower court in Ontario confirmed that once the divorce was granted in Trinidad, the wife would no longer be a spouse for the purpose of spousal support pursuant to the *FLA*: *Nicholas*, at para. 35.

[41] Although Price J. was not required to answer the question of whether Mrs. Stefanou had a valid claim for spousal support under the *FLA* he suggested in obiter that: "the weight of the case law and the language of the *Divorce Act* and the *Family Law Act* suggest that she would have difficulty pursuing such a claim in Ontario."

[42] In *Ahmad v. Khalid*, 2017 ONSC 7495, the parties were resident in Pennsylvania. Shortly after they separated, the husband commenced a divorce petition in that state seeking a divorce and property division. A few months later the wife commenced an application for support in Ontario. The court held, at paras. 53-54, that: "the State of Pennsylvania has not yet issued a Decree of Divorce. The Applicant continues to have the status of a spouse in regards to the support provisions of the *Family Law Act*".

[43] In *Sharma v. Sharma,* 2018 ONSC 862, the husband commenced a petition for divorce in Trinidad and Tobago. The wife commenced a claim for child and spousal support under the *FLA* in Ontario. The wife had obtained a stay of the Trinidad divorce proceeding which the husband then appealed. Before the appeal was heard in Trinidad, the wife brought a motion for summary judgement in the Ontario proceeding. In rejecting the Father's request for an adjournment, Kurz J. confirmed, at para. 12, that once the foreign divorce issued, this court would lose jurisdiction to adjudicate the issue of spousal support.

[44] I find that while the Ontario Court currently has *jurisdiction simplicter* to deal with the Mother's claim for spousal support under the *FLA,* that jurisdiction will be lost after the parties are divorced as she will no longer be a spouse within the definition of the *FLA*.

(ii) *Forum Non Conveniens*

[45] I have found that Ontario has *jurisdiction simplicter* over the issue of spousal support in addition to the parenting issues and child support. The Father must now demonstrate that Ontario is *forum non conveniens*: *Van Breda*, at para. 102; *Knowles*, at para. 41.

[46] The Father acknowledged in his factum (drafted before the Arizona Court had ruled on the issue of jurisdiction, to support his argument that child support should also be dealt with in Arizona): "two courts in two different jurisdictions should not be determining [his] income" as "[s]uch a process would not be efficient or fair to either party". Although the two jurisdictions will be inevitably engaged at first instance,

what might be avoided, is the need to engage two jurisdictions in the future. The parties' children are young. The Mother is seeking to obtain further education and to re-enter the work force. The Father is in a relationship with a woman who lives in Toronto with her child. It is not difficult to foresee that there could be a number of variations to the interrelated issues of child and spousal support over the years to come.

[47] If spousal support is determined by the Arizona Court, the parties will be required to return to that jurisdiction for variations even if neither of them is residing in that State or even in the U.S.[3] The parties will be required to retain counsel in two separate jurisdictions, as is the case now, and they will be required to travel to the court outside the jurisdiction. This could be more of a burden on the Mother who has primary care of the children whereas the Father has an apartment in Toronto and regularly travels to Ontario to see the children and his girlfriend.

[48] The parties lived in Arizona for only a very brief period of time before they separated. The Mother and the children have few if any connections to Arizona other than that the Father lives there part of the time and works there. The Mother and the children intend to live in Durham Region for the foreseeable future.

[49] Another factor to consider in the overall assessment of *forum non conveniens* is that the quantum of spousal support in Ontario both at first instance and in variations is determined with reference to the *Spousal Support Advisory Guidelines* (*Gray v. Gray,* 2014 ONCA 659, 122 O.R. (3d) 337). The *SSAG* formulas are designed to and do make it easier for parties to resolve spousal support issues. According to the evidence, Arizona does not have a similar formula or guidelines governing spousal support.

[50] The evidence suggests that the award of spousal support could be significantly higher in Ontario than in Arizona; if this is the case, this puts the Mother at a possible juridical disadvantage were this court to decline jurisdiction: *Knowles*, at para. 43.

[51] As is set out below, I have found that Ontario does not have jurisdiction over property division. The Father argues that as the Arizona Court will be determining property division it should also deal with spousal support as the two issues are interconnected and the property division issue must be decided first. In *Greenglass v. Greenglass*, 2010 ONCA 675, 276 O.A.C. 62, the Court of Appeal held, at para. 44, that: "As a matter of law, therefore, the calculation of the division of assets and resulting equalization payment must always precede any support analysis." This is so as the court must consider any income generated from the recipient's property among other

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[3] On April 19, 2018, a conference call was held between Judge Hopkins of the Arizona Court and this court. The purpose of the hearing was to identify the jurisdictional issues and to ascertain what the impact would be if our respective findings conflicted; it was not to determine jurisdiction. In that teleconference, Judge Hopkins stated that the Arizona Court would honour and enforce a final order for spousal support of this court made prior to an order of the Arizona Court. Judge Hopkins also advised that based on the laws of Arizona, if the Arizona Court adjudicates the issue of spousal support at first instance, it retains jurisdiction indefinitely even if neither party has any connection with the State.

things. This principle is equally applicable to claims under the *FLA*: *Shaikh v. Shaikh*, 2016 ONSC 7400, at para. 29.

[52] The parties will need the determination of the Arizona Court with respect to the division of property before spousal support can be determined on a final basis in Ontario. This does not necessarily mean, however, that it is impractical for this court to deal with the latter issue *particularly when jurisdiction is already divided.* Property division is a "one-time" determination whereas the issues of child support and spousal support have a significant legal nexus in this case *over the long term* and the support issues should ideally both be dealt with in the same jurisdiction.

[53] The Arizona Court will honour and enforce a final order for spousal support made in Ontario provided it is made prior to a final order in Arizona.

[54] Having regard to the factors set out in *Van Breda* at para. 105, I find that the Father has not demonstrated that Ontario is *forum non conveniens* with respect to the issue of spousal support.

[55] I recognize that my ruling will likely foster a "race to the finish" by both parties to obtain judgement in their "favoured" jurisdiction. I believe that Judge Hopkins shared my concerns about this unsatisfactory although perhaps unavoidable outcome. Again, I would strongly encourage the parties to consider the factors set out above to attempt to reach some resolution.

4. Jurisdiction over Property Division

[56] Section 15 of the *FLA* states:

> **Conflict of laws**
>
> **15** The property rights of spouses arising out of the marital relationship are governed by the internal law of the place where both spouses had their last common habitual residence or, if there is no place where the spouses had a common habitual residence, by the law of Ontario.

[57] The last common habitual residence is the place where the spouses most recently lived together as and participated together in everyday family life: *Adam v. Adam* (1994), 7 R.F.L. (4th) 63 appeal dismissed at (1996), 25 RFL (4th) 50 (Ont. C.A.), at para. 12, citing *Pershadsingh v. Pershadsingh* (1987), 60 O.R. (2d) 437 (H.C.).

[58] Habitual residence is to be determined more by the quality of the residence rather than the length of the residence. An element of intention to reside is necessary although not determinative: *Pershadsingh*, at 439.

[59] The parties' last common habitual residence was Arizona although they had not lived there long. The parties moved to Arizona as a family when the Father obtained a new job. They purchased a family residence in Arizona and move all their furniture

into this home. They enrolled Elodie in school in Arizona and the family accessed health professionals there. Having regard to all of the evidence, I find that the parties' last common habitual residence was Arizona.

[60] I find that Ontario does not have *jurisdiction simplicter* over the issue of property division.

[61] In this case it appears inevitable that there will be, at least at first instance, proceedings in two separate jurisdictions. The Arizona Court does not have jurisdiction over child related issues whereas they are properly before this court. This court does not have jurisdiction over the divorce or property division whereas the Arizona Court does. This leaves the issue of spousal support. This court has jurisdiction over this issue until such time as the parties are divorced. This court would also maintain jurisdiction if a final order for spousal support were made prior to the divorce.

ORDER:

[62] This court does not have jurisdiction over the Applicant (Mother)'s claims for a divorce and corollary relief under the *Divorce Act,* and her claim for an equalization of net family property pursuant to the *FLR.*

[63] The remainder of the claims advanced by the Applicant (Mother) in her Application are properly within the jurisdiction of this court.

[64] The parties may make oral submissions with respect to costs at the Case Conference set for June 22, 2018. They may file any offers to settle and their bill of costs at that time.

JUSTICE L.E. FRYER

Released: June 15, 2018

Corrections:

1. Counsel's name has been corrected to Richard, not Richards.
2. Paragraph 8 – this now reads: "The Father maintains an apartment in Toronto; his girlfriend also lives in Toronto."

Corrigenda Released: June 25, 2018

CORRIGENDA

1. Page 1: Counsel's name is corrected to Richard, not Richards.
2. Paragraph 8, the paragraph should read: The Father maintains an apartment in Toronto; his girlfriend also lives in Toronto.