Okmyansky v. Okmyansky

86 O.R. (3d) 587
Court of appeal for Ontario,
Feldman, Sharpe and Simmons JJ.A.
June 12, 2007

Conflict of laws -- Jurisdiction -- Family law -- Ontario court not having jurisdiction to hear and determine corollary relief proceeding under Divorce Act following valid divorce in foreign jurisdiction -- Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).

Family law -- Property -- Jurisdiction -- Ontario court having jurisdiction under Family Law Act to hear and determine equalization claim by former spouse following valid divorce in foreign jurisdiction -- Family Law Act, R.S.O. 1990, c. F.3.

Family law -- Support -- Jurisdiction -- Parties divorced in Russia -- Wife subsequently bringing support application in Ontario -- Application for support stayed -- Former spouse not entitled to claim support under Family Law Act -- Family Law Act, R.S.O. 1990, c. F.3.

The parties were married in Russia in 1974. They lived together in Ontario for about six months in 2003. The husband returned to Russia and obtained a divorce. The wife then brought an application in Ontario for support under the Divorce Act or the Family Law Act ("FLA") and a division of assets under the FLA. The husband challenged the jurisdiction of the Ontario courts to entertain the application. Following a trial of the preliminary issue of jurisdiction, the trial judge found that the Russian divorce decree was valid in Ontario, that the parties' last common habitual residence was in Ontario, and that it would not be appropriate to stay the wife's application. The husband appealed.

Held, the appeal should be allowed in part.

An Ontario court does not have jurisdiction to hear and determine a corollary relief proceeding under the Divorce Act following a valid divorce in a foreign jurisdiction. That portion of the application requesting corollary relief under the Divorce Act should be stayed.

A former spouse is not entitled to claim support under the FLA. Accordingly, that portion of the application requesting support under the FLA should be stayed.

An Ontario court has jurisdiction under the FLA to hear and determine an equalization claim by a former spouse following a valid divorce in a foreign jurisdiction. There is no basis for interpreting the term "former spouse" in Part I of the FLA as being restricted to a former spouse divorced in Canada.

APPEAL from the order of Paisley J. of the Superior Court of Justice, dated October 20, 2006, dismissing an application for a stay of proceedings.

Cases referred to G.M. v. M.A.F., 2003 CanLII 41691 (QC CA), [2003] J.Q. no 11325, [2003] R.J.Q. 2516, J.E. 2003-1715, [2003] R.D.F. 794, 127 A.C.W.S. (3d) 489 (C.A.); L.R.V. v. A.A.V., 2006 BCCA 63 (CanLII), [2006] B.C.J. No. 264, 264 D.L.R. (4th) 524 (C.A.); O.M. v. A.K., [2000] Q.J. No. 3224, J.E. 2000-1705, [2000] R.D.F. 761, 9 R.F.L. (5th) 111 (S.C.); Rothgiesser v. Rothgiesser (2000), 2000 CanLII 1153 (ON CA), 46 O.R. (3d) 577, [2000] O.J. No. 33, 183 D.L.R. (4th) 310, 2 R.F.L. (5th) 266 (C.A.), consd Other cases referred to Dashtarai v. Shahrestani, [2006] O.J. No. 5367 (S.C.J. Fam. Ct.); Jahangiri-Mavaneh v. Taheri-

Zengekani, 2005 CanLII 17771 (ON CA), [2005] O.J. No. 2055, 14 R.F.L. (6th) 9 (C.A.), revg (2003), 2003 CanLII 1962 (ON SC), 66 O.R. (3d) 272, [2003] O.J. No. 3018, 39 R.F.L. (5th) 103 (S.C.J.); Mercieca v. Mercieca, 2002 CanLII 2754 (ON SC), [2002] O.J. No. 4935, [2002] O.T.C. 996, 32 R.F.L. (5th) 392 (S.C.J.); Wlodarczyk v. Spriggs, 2000 SKQB 468 (CanLII), [2000] S.J. No. 703, 200 Sask. R. 129, 12 R.F.L. (5th) 241 (Unif. Fam. Ct.). Statutes referred to Constitution Act, 1867, s. 91 Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), ss. 2 "corollary relief proceeding", "custody order", "divorce proceeding", "spousal support order", "spouse", "support order", "variation order" [as am.], 3 [as am.], 4 [as am.], 5 [as am.], 15 [as am.], 15.2 [as am.], 17 [as am.], 22 Divorce Act, S.C. 1967-68, c. 24, ss. 5, 11 Family Law Act, R.S.O. 1990, c. F.3, ss. 1 "spouse" [as am.], 4-16 [as am.], 29-49 [as am.] Matrimonial and Family Proceedings Act 1984 (U.K.), 1984, c. 42 Matrimonial Causes Act 1973 (U.K.), 1973, c. 18 Rules and regulations referred to Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 17 [as am.] Authorities referred to Hovius, B., Family Law: Cases, Notes and Materials, 4th ed. (Toronto: Carswell, 1996) Payne, J.D., Payne on Divorce, 4th ed. (Toronto: Carswell, 1996)

Alla Koren, for appellant.

Elizabeth Julien-Wilson, for respondent.

The judgment of the court was delivered by

SIMMONS J.A.: --

I. Overview

[1] The issues on this appeal concern the jurisdiction of Ontario courts to entertain support and property applications following a valid divorce in a foreign jurisdiction.

[2] Natalia and Yevgeny Okmyansky were married in Russia in 1974. During 2003, they lived together in Ontario for about six months. In July 2003, Mr. Okmyansky returned to Russia and applied for a divorce. After the divorce was granted, Ms. Okmyansky commenced this application, claiming support under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) or the Family Law Act, R.S.O. 1990, c. F.3, and a division of assets under the Family Law Act.

[3] Mr. Okmyansky challenged the jurisdiction of the Ontario courts to entertain Ms. Okmyansky's application. Following a trial of the preliminary issue of jurisdiction, Paisley J. concluded that the Russian divorce decree is valid in Ontario. However, he also found that the parties' last common habitual residence was in Ontario and that it would therefore not be appropriate to stay Ms. Okmyansky's application.

[4] Mr. Okmyansky appeals the trial judge's decision not to stay the application. He contends that, in the face of the Russian divorce, there is no jurisdiction under the Divorce Act or the Family Law Act to grant the relief Ms. Okmyansky has requested. He raises the following issues on appeal:

> (1) Does an Ontario court have jurisdiction to hear and determine a corollary relief proceeding under the Divorce Act following a valid divorce in a foreign jurisdiction?
>
> (2) Does an Ontario court have jurisdiction under the Family Law Act to hear and determine a support claim made by a former spouse?

(3) Does an Ontario court have jurisdiction under the Family Law Act to hear and determine an equalization claim following a valid divorce in a foreign jurisdiction?

[5] For the reasons that follow, I would answer "no" to the first two questions and "yes" to the third question. Accordingly, I would allow the appeal in part, set aside the trial judge's order declining to stay Ms. Okmyansky's application, and substitute an order staying her support claims only.

II. Background

[6] The parties grew up, were married and had children in the former U.S.S.R. (now Russia). They left Russia in 1990, but returned in 1992. In 1995, the family moved to the United States. They remained there until January 2003, when Mr. Okmyansky and Ms. Okmyansky came to Canada. On April 15, 2003, the couple purchased a condominium in Toronto for $586,000.

[7] As already noted, Mr. Okmyansky returned to Russia in July 2003 and applied for a divorce. Ms. Okmyansky received notice of the divorce proceedings and retained a Russian lawyer to represent her. The divorce was granted by a Russian court on February 26, 2004, and came into force on May 12, 2004. On August 30, 2004, at Mr. Okmyansky's request, a Russian court determined that each of the parties holds a one-half interest in a Moscow apartment originally purchased in Ms. Okmyansky's name.

[8] Following the divorce, Ms. Okmyansky commenced this application on August 18, 2004. In addition to her claims for support and equalization of assets, she also claimed relief relating to the Moscow apartment, a U.S. timeshare and a business operated by Mr. Okmyansky.

[9] In response to Ms. Okmyansky's application, Mr. Okmyansky brought a motion under Rule 17 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 disputing the jurisdiction of the Ontario courts to entertain this proceeding and requesting that service of the originating process out of the jurisdiction be set aside and that the application be stayed. He relied on his Russian divorce and claimed that Russia is the proper forum for this action. In the alternative, he claimed that Ms. Okmyansky is "statute barred" from obtaining the relief she requested because the parties were validly divorced in Russia, the issue of property division was adjudicated by the Russian courts and the parties' last common domicile was Russia.

[10] On February 21, 2005, Backhouse J. held that Mr. Okmyansky's motion could not be determined on a paper record and would have to be dealt with at a trial. She also directed that Mr. Okmyansky deliver an answer and financial statement so that the substantive issues could be addressed at trial if the court found that it had jurisdiction.

[11] Mr. Okmyansky brought a motion in the Divisional Court for leave to appeal the February 21, 2005 order. On June 30, 2005, Sachs J. made a consent order varying the February order by directing that "[t]he issue of the jurisdiction of the Ontario Court over the matters raised [in this proceeding] and the related sub-issues (validity of foreign divorce and last common habitual residence of the parties) shall proceed to trial of that issue first".

III. The Trial Judge's Reasons

[12] The trial concerning jurisdiction proceeded in October 2006. The trial judge found that the parties occupied their Toronto condominium as a common habitual residence and that Ontario was their last common habitual residence. However, he also concluded that Mr. Okmyansky had a real and substantial

connection to Russia at the time he applied for the divorce and that Mr. Okmyansky did not choose Russia as the forum for the divorce based on any oblique motive. The trial judge therefore held that the Russian divorce decree is valid in Ontario.

[13] After stating that those findings answered "the questions that were directed for resolution by the Divisional Court", the trial judge said the question of whether Ms. Okmyansky could pursue property claims under the Family Law Act in the face of the Russian divorce was "an issue of law which should only be decided with a proper factual foundation". He also said, "[I]t would be unfair to [Ms. Okmyansky] to stay the application in that [her] position through her counsel was that the jurisdictional issues were limited to those referred to in the order of the Divisional Court." When pressed by counsel for clarification, the trial judge responded that his ruling made it clear that Ontario has jurisdiction to deal with the property and support issues, but that he would make no comment on the merit of those claims.

IV. Relevant Statutory Provisions

(i) The support claim under the Divorce Act

[14] In order to determine the issues on appeal, it is necessary to review the sections of the Divorce Act dealing with jurisdiction in all three types of proceedings that are available under the Act (a divorce proceeding, a corollary relief proceeding and a variation proceeding) and to also consider certain sections of the Act dealing with support and variation orders.

[15] In essence, the Divorce Act provides that a court has jurisdiction to entertain a divorce proceeding where either spouse has been ordinarily resident in the province for one year prior to commencing the proceeding. In relation to both corollary relief and variation proceedings it is only necessary that one of the spouses reside in the province where the application is made. Significantly, in relation to variation proceedings, the Divorce Act makes it clear that a court only has power to vary corollary relief orders made under the Act.

[16] The sections of the Divorce Act that are relevant to the support claim are as follows:

> 2(1) In this Act, ...
>
> "corollary relief proceeding" means a proceeding in a court in which either or both former spouses seek a child-support order, a spousal support order or a custody order; . . . . .
>
> "custody order" means an order made under subsection 16(1);
>
> "divorce proceeding" means a proceeding in a court in which either or both spouses seek a divorce order alone or together with a child-support order, a spousal support order or a custody order; . . . . .
>
> "spousal support order" means an order made under subsection 15.2(1);
>
> "spouse" means either of two persons who are married to each other;
>
> "support order" means a child support order or a spousal support order;
>
> "variation order" means an order made under subsection 17(1);

"variation proceeding" means a proceeding in a court in which either or both former spouses seek a variation order. . . . . .

3(1) A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in the province for a least one year immediately preceding the commencement of the proceeding. . . . . .

4(1) A court in a province has jurisdiction to hear and determine a corollary relief proceeding if

> (a) either former spouse is ordinarily resident in the province at the commencement of the proceeding; or
>
> (b) both former spouses accept the jurisdiction of the court. . . . . .

5(1) A court in a province has jurisdiction to hear and determine a variation proceeding if

> (a) either former spouse is ordinarily resident in the province at the commencement of the proceeding; or
>
> (b) both former spouses accept the jurisdiction of the court. . . . . .

15. In sections 15.1 to 16, "spouse" has the meaning assigned by subsection 2(1), and includes a former spouse. . . . . .

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums as the court thinks reasonable for support of the other spouse. . . . . .

17(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

> (a) a support order or any provision thereof on application by either or both former spouses . . . .

[17] Section 22 of the Divorce Act sets out the recognition rules for foreign divorces:

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. . . . . .

(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.

(ii) The support claim under the Family Law Act

[18] Part III (ss. 29-49) of the Family Law Act deals with support obligations. Section 33(1) provides that a court may order a person to provide support for his or her dependants. "Dependant" is defined in s. 29

to mean a person to whom another has an obligation to provide support. Section 30 states that spouses have an obligation to provide for their own support and for their spouse's support in accordance with need and capability.

[19] Under s. 1 of the Family Law Act, spouses are defined as persons who are married to one another or who have entered into a marriage that is void or voidable in good faith. Section 29 extends the definition of spouse to unmarried persons in limited circumstances (not applicable in this case) for the purpose of a support application.

[20] The sections of the Family Law Act that are relevant to the support claim are as follows:

1. In this Act,

"spouse" means either of two persons who,

(a) are married to each other, or

(b) have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right.
("conjoint") . . . . .

PART III SUPPORT OBLIGATIONS

29. In this Part,

"dependant" means a person to whom another has an obligation to provide support under this Part; ("personne à charge")

"spouse" means a spouse as defined in subsection 1(1), and in addition includes either of two persons who are not married to each other and have cohabited,

(a) continuously for a period of not less than three years, or

(b) in a relationship of some permanence, if they are the natural or adoptive parents of a child. ("conjoint")

30. Every spouse has an obligation to provide support for himself or herself and for the other spouse, in accordance with need, to the extent that he or she is capable of doing so. . . . . .

33(1) A court may, on application, order a person to provide support for his or her dependants and determine the amount of support.

(ii) The equalization claim under the Family Law Act

[21] Part I (ss. 4-16) of the Family Law Act deals with "Family Property". Section 5 provides that a spouse, as defined in s. 1, is entitled to an equalization of net family properties when the spouses are divorced, a marriage is declared a nullity or the spouses are separated with no reasonable prospect of cohabitation. Section 7 provides that a court may determine any matter relating to the spouses' entitlement under s. 5 on the application of a spouse, former spouse or deceased spouse's personal representative. Section 7 sets out the limitation period for advancing an equalization claim -- one aspect

of the limitation period is that an equalization claim may not be brought more than two years after a divorce. Section 15 is the Part I conflict of laws provision.

[22] The sections of the Family Law Act that are relevant to the equalization claim are as follows:

> PART I FAMILY PROPERTY
>
> 4(1) In this Part, ...
>
> "net family property" means the value of all the property, except property described in subsection (2), that a spouse owns on the valuation date, after deducting,
>
> (a) the spouse's debts and other liabilities, and
>
> (b) the value of property, other than a matrimonial home that the spouse owned on the date of marriage, after deducting the spouse's debts and other liabilities, calculated at the date of marriage; ("biens familiaux nets") . . . . .
>
> 5(1) When a divorce is granted or a marriage is declared a nullity, or when the spouses are separated and there is no reasonable prospect that they will resume cohabitation, the spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them. . . . . .
>
> 7(1) The court may, on the application of a spouse, former spouse or deceased spouse's personal representative, determine any matter respecting the spouses' entitlement under section 5. . . . .
>
> (3) An application based on subsection 5(1) or (2) shall not be brought after the earliest of,
>
> > (a) two years after the day the marriage is terminated by divorce or judgment of nullity;
> >
> > (b) six years after the day the spouses separate and there is no reasonable prospect that they will resume cohabitation;
> >
> > (c) six months after the first spouse's death. . . . . .
>
> 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.

V. The Positions of the Parties on Appeal

(i) Mr. Okmyansky

[23] Mr. Okmyansky relies on this court's decision in Rothgiesser v. Rothgiesser (2000), 2000 CanLII 1153 (ON CA), 46 O.R. (3d) 577, [2000] O.J. No. 33 (C.A.) as establishing: (i) that an Ontario court only has jurisdiction to hear and determine a corollary relief proceeding under the Divorce Act where the parties were divorced in Canada; and (ii) that there is no jurisdiction under the Family Law Act to grant spousal support to a former spouse.

[24] Rothgiesser v. Rothgiesser, supra, involved a couple who were divorced in South Africa. Their final order of divorce incorporated terms on which the parties had settled various issues, including spousal

support. In 1990, the Rothgiessers consented to an order in Ontario increasing the amount of spousal support payable to the former wife. Subsequently, in 1998, the former husband brought a variation application under the Divorce Act, requesting that spousal support for his former wife be terminated. On the appeal from the order terminating spousal support, this court concluded that the 1990 spousal support order was a nullity.

[25] In particular, this court found that the 1990 spousal support order could not have been made under the Family Law Act, as the parties were not spouses as required by that Act at the time the 1990 spousal support order was made. Further, this court held that a Canadian court had no jurisdiction under the Divorce Act to make the 1990 spousal support order either by way of a corollary relief proceeding or by way of a variation proceeding given the foreign divorce.

[26] This court's conclusion in Rothgiesser v. Rothgiesser, supra, concerning the jurisdiction to make a corollary relief order under the Divorce Act in the face of a foreign divorce was premised on the wording of s. 4 of the Divorce Act in 1990, i.e., only the court that granted the divorce had jurisdiction to hear a corollary proceeding. However, at paras. 58-59, this court went on to consider the wording of the current version of s. 4 (which provides a court has jurisdiction to hear a corollary relief proceeding where either spouse is ordinarily resident in the province) and concluded that the current version of s. 4 does not give Canadian courts jurisdiction "to deal with support obligations in the absence of a Canadian divorce":

In these reasons, I referred to s. 4 of the Divorce Act as it read in 1990 at the time of the [1990 support] order. I also mentioned that s. 4 was amended as of March 25, 1993. I repeat this section as it read prior to and since the amendment:

> 4. A court has jurisdiction to hear and determine a corollary relief proceeding if the court has granted a divorce to either or both former spouses.
>
> 4(1) A court in a province has jurisdiction to hear and determine a corollary relief proceeding if
>
> > (a) either former spouse is ordinarily resident in the province at the commencement of the proceeding; or
> >
> > (b) both former spouses accept the jurisdiction of the court.

In his textbook earlier referred to [Payne on Divorce, 4th ed. (Toronto: Carswell, 1996)], Professor Payne wrote that the amendment "appears sufficiently broad to enable a foreign divorcee to institute proceedings for support and custody under sections 15 and 16 of the Act, if he or she has established ordinarily residence in a Canadian province." The implication of this view is great and thus merits correction.

In my view, the amendment did no such thing. Whereas Parliament had previously limited jurisdiction to the court that had granted the divorce, the amendment extended the jurisdiction by authorizing a Canadian court to hear a corollary relief proceeding if either spouse were ordinarily resident in the province or if both former spouses accepted the jurisdiction of the court. Parliament did not intend to give Canadian courts jurisdiction over foreign divorces. As Professor Hovius correctly noted [in Family Law: Cases, Notes and Materials, 4th ed. (Toronto: Carswell, 1996)], Parliament's jurisdiction over support is ancillary to its jurisdiction over divorce pursuant to s. 91 of the Constitution Act, 1867. Any

attempt to deal with support obligations in the absence of a Canadian divorce would encroach on provincial jurisdiction (s. 92, "Property and Civil Rights").

[27] Concerning the jurisdiction of an Ontario court under the Family Law Act to hear and determine Ms. Okmyansky's equalization claim, Mr. Okmyansky acknowledges that s. 7 of the Family Law Act permits an application by a former spouse. However, he submits that former spouse in this context must refer to a person divorced in Canada for two reasons: (i) because s. 5 of the Family Law Act requires that the entitlement to an equalization be determined "when a divorce is granted"; and (ii) because "former spouse" has been consistently interpreted by Canadian courts to mean a person divorced in Canada.

(ii) Ms. Okmyansky

[28] On the appeal hearing, Ms. Okmyansky submitted that the appeal should be dismissed because the issues raised on appeal by Mr. Okmyansky were not the subject of the preliminary trial. We did not accept this submission, but reserved our decision on the appeal to provide Ms. Okmyansky with the opportunity to make written submissions on the issues raised by Mr. Okmyansky. We afforded Mr. Okmyansky a right of reply.

[29] In her written submissions, Ms. Okmyansky questions whether this court's statements in Rothgiesser v. Rothgiesser, supra, concerning the interpretation of the current version s. 4 of the Divorce Act are binding. She notes that there are no qualifications in s. 4 of the Divorce Act; rather, it provides simply that a court has jurisdiction to hear a corollary relief proceeding if either former spouse is resident in the province. Further, there is no definition of "former spouse" in the Divorce Act, restricting that phrase to persons divorced in Canada. Moreover, s. 22(1) of the Divorce Act provides that a foreign divorce that is recognized as valid "shall be recognized for all purposes of determining the marital status in Canada of any person". Relying on a plain reading of the Divorce Act, Ms. Okmyansky submits that as she is a resident of Ontario and as the Russian divorce gives her the status of a former spouse, she is entitled to bring a corollary relief proceeding under the Divorce Act in Ontario.

[30] As for her equalization claim, Ms. Okmyansky submits that there is no requirement in the Family Law Act that an application for equalization be made before a divorce is granted. On the contrary, s. 7 specifically permits an application by a former spouse. As with the Divorce Act, there is no definition of former spouse in the Family Law Act. Even if there is a rationale for interpreting the jurisdiction provisions of the Divorce Act restrictively, there is no similar rationale for interpreting the term "former spouse" restrictively as it relates to property claims under the Family Law Act.

VI. Analysis

1. Does an Ontario court have jurisdiction to hear and determine a corollary relief proceeding under the Divorce Act following a valid divorce in a foreign jurisdiction?

[31] Although this court's statements in Rothgiesser v. Rothgiesser, supra, concerning the interpretation of the current version of s. 4 of the Divorce Act may be obiter, I nevertheless agree with the conclusion that an Ontario court does not have jurisdiction to hear and determine a corollary relief proceeding under the Divorce Act following a valid divorce in a foreign jurisdiction. I reach this conclusion based on a review of the legislative history of the jurisdiction provisions in the Divorce Act and based on a consideration of the language of s. 4 within the context of the entire Act.

[32] The Divorce Act, S.C. 1967-68, c. 24 (the "1968 Act"), introduced the first comprehensive national divorce legislation in Canada. On February 13, 1986, the 1968 Act was superseded by the present Act, the Divorce Act, R.S.C. 1985, c.3(2nd Supp.) 1985 (the "1985 Act"). A review of the legislative history of the jurisdiction provisions in both Acts reveals the following:

(i) The 1968 Act

-- under s. 5 of the 1968 Act, a court in a province had jurisdiction to "entertain a petition for divorce and to grant relief in respect thereof" if the person who presented the petition was domiciled in Canada and if either spouse had been ordinarily resident in the province for 12 months and actually resident in the province for ten months;

-- under s. 11(1), a court was entitled to make orders for spousal and child maintenance and for custody (the title and sidenotes to s. 11 referred to such orders as "corollary relief") "upon granting a decree nisi of divorce";

-- under s. 11(2), a corollary relief order could be varied "by the court that made the order".

(ii) The 1985 Act

-- the 1985 Act introduced the concept of a corollary relief proceeding, thereby making it clear that an order for corollary relief could be made after a divorce was granted. The 1985 Act included definitions of "divorce proceeding", "corollary relief proceeding" and "variation proceeding" and also contained separate jurisdiction provisions for each form of proceeding;

-- under s. 3 of the 1985 Act, the requirement that a party seeking a divorce be domiciled in Canada was removed and the residence requirement was modified -- a court in a province could "hear and determine" a divorce proceeding where either spouse had been ordinarily resident in the province for a period of one year immediately prior to the commencement of the proceeding;

-- under s. 4, a court in a province could hear and determine a corollary relief proceeding only if the court had granted a divorce to either or both former spouses;

-- significantly, under s. 5, a court in a province could hear and determine a variation proceeding if either former spouse was ordinarily resident in the province at the commencement of the proceeding or if both spouses accepted the jurisdiction of the court;

-- while s. 5 extended the jurisdiction to hear a variation proceeding to a court in a province where either former spouse was ordinarily resident, it is clear from reading the Act as a whole that this extension did not confer jurisdiction on Canadian courts to vary the support and custody provisions of a foreign divorce decree. In particular, s. 17 of the Divorce Act sets out a court's power to vary an existing order and refers specifically to the power of a court to vary a "custody order" and a "support order". "Custody order" and "support order" are defined in s. 2 of the Divorce Act by reference to the section in the Act under which such an order can be made. The power to vary orders for custody and support is therefore expressly limited to orders made under the Act and does not include the power to vary corollary relief orders made as part of a foreign divorce decree.

(iii) The 1993 amendment to s. 4

-- s. 4 of the 1985 Act, which limited the jurisdiction to hear a corollary relief proceeding to the court that granted the divorce was amended on March 25, 1993 by S.C. 1993, c. 8, s. 1 (the "1993 amendment");

-- following the 1993 amendment, a court in a province had the same jurisdiction to hear and determine a corollary relief proceeding as it had to hear and determine a variation proceeding, i.e., if either former spouse was ordinarily resident in the province at the commencement of the proceeding or if both spouses accept the jurisdiction of the court.

[33] In my view, when considered in the light of the legislative history of the jurisdiction provisions in the Divorce Act, the obvious purpose of the 1993 amendment was to bring the jurisdiction to hear and determine a corollary relief proceeding in to line with the jurisdiction to hear and determine a variation proceeding. As a result, rather than having to return to the court in the place where the divorce was granted, a former spouse wishing to commence a corollary relief proceeding can do so in the province where he or she is ordinarily resident. I see nothing in the legislative history of the Divorce Act to indicate that Parliament intended the 1993 amendment to confer jurisdiction on Canadian courts to hear and determine a corollary relief proceeding under the Divorce Act following a valid divorce in a foreign jurisdiction.

[34] My conclusion concerning the purpose of the 1993 amendment is consistent with the brief references to its purpose contained in the legislative debates leading up to its enactment. Significantly, there is no reference in these debates to an intention to broaden the scope of Canadian divorce legislation to permit a Canadian court to make an order for corollary relief relating to a divorce that was granted in a foreign jurisdiction.

[35] In Rothgiesser v. Rothgiesser, supra, this court doubted Parliament's jurisdiction under s. 91 of the Constitution Act, 1867, to enact legislation dealing with support obligations in the absence of a Canadian divorce. The parties in this case did not make submissions concerning the extent of Parliament's legislative authority under the Constitution Act.

[36] However, even assuming that Parliament is empowered to enact a provision dealing with support following a foreign divorce as part of the Divorce Act, I consider it unlikely that Parliament would do so without clearly signalling its intention in that respect and without considering the appropriateness of such legislation in the context of private international law.

[37] For example, had Parliament intended to give Canadian courts the authority to grant support following a foreign divorce, it is likely that Parliament would have considered whether it was also appropriate to enact a provision addressing in what circumstances a Canadian court should exercise that authority. [See Note 1 below] As there is no indication that Parliament considered international law consequences when enacting the 1993 amendment and no clear statement in the Divorce Act that Parliament intended the 1993 amendment to confer jurisdiction on Canadian courts to deal with support following a foreign divorce, I conclude that was not Parliament's intention.

[38] I find further support for my conclusion that s. 4 does not permit a former spouse divorced pursuant to a foreign divorce decree to commence a corollary relief proceeding under the Divorce Act based on a consideration of the Act as a whole. In my view, the very description of orders for spousal support, custody and child support as "corollary relief" confirms Parliament's intention that these orders

are intended as forms of relief that are incidental to the granting of the divorce. If a divorce was not granted in Canada, it is difficult to see how the making of a support order could properly be viewed as "corollary relief".

[39] The British Columbia Court of Appeal recently considered the jurisdiction of a Canadian court to hear and determine a corollary relief proceeding under the Divorce Act following a foreign divorce in L.R.V. v. A.V.V., 2006 BCCA 63 (CanLII), [2006] B.C.J. No. 264, 264 D.L.R. (4th) 524 (C.A.). After considering the legislative history of the jurisdiction provision in the 1968 Act and the 1985 Act, the court concluded that s. 4 of the Divorce Act does not confer jurisdiction on a Canadian court to hear and determine a corollary relief proceeding in such circumstances.

[40] The Québec Superior Court and the Québec Court of Appeal each reached the opposite conclusion in O.M. v. A.K., [2000] Q.J. No. 3224, 9 R.F.L. (5th) 111 (S.C.) and G.M. v. M.A.F., 2003 CanLII 41691 (QC CA), [2003] J.Q. no 11325, [2003] R.J.Q. 2516 (C.A.). However, these courts did not review the legislative history of the relevant provisions in either of those decisions and I prefer the reasoning of the British Columbia Court of Appeal for the reasons set out above.

[41] I accordingly conclude that an Ontario court does not have jurisdiction to hear and determine a corollary relief proceeding under the Divorce Act following a valid foreign divorce. As no appeal has been taken from the trial judge's finding that the Russian divorce is valid in Ontario, I would stay that portion of Ms. Okmyansky's application requesting corollary relief under the Divorce Act.

> 2. Does an Ontario court have jurisdiction under the Family Law Act to hear and determine a support claim made by a former spouse?

[42] In her written submissions, Ms. Okmyansky did not argue that a former spouse is entitled to claim support under the Family Law Act. I note that there is no provision in the Act allowing such a claim. Further, in Rothgiesser v. Rothgiesser, supra, this court indicated at para. 26 that a former spouse is not entitled to advance a support claim under the Family Law Act. I would accordingly stay that portion of Ms. Okmyansky's application requesting support under the Family Law Act.

> 3. Does an Ontario court have jurisdiction under the Family Law Act to hear and determine an equalization claim made by a former spouse following a valid divorce in a foreign jurisdiction?

[43] In my view, there is no basis for interpreting the term "former spouse" in Part I of the Family Law Act as being restricted to a former spouse divorced in Canada. I accordingly conclude that the fact that Mr. Okmyansky obtained a valid divorce in Russia does not preclude Ontario from entertaining Ms. Okmyansky's equalization claim.

[44] Mr. Okmyansky submits that because s. 5 of the Family Law Act requires that the entitlement to an equalization be determined when a divorce is granted, it is clear that the equalization provisions can only be applied in the context of a Canadian divorce proceeding. Further, he says that "former spouse" has consistently been interpreted in the case law as meaning a former spouse divorced in Canada. I reject these submissions.

[45] Contrary to Mr. Okmyansky's submissions, s. 5 of the Family Law Act does not govern when an equalization application is determined; rather, it sets out the circumstances that trigger a spouse's

entitlement to an equalization. Those circumstances are: when a divorce is granted, when a marriage is declared a nullity and when parties separate with no reasonable prospect of cohabitation.

[46] Section 7 of the Family Law Act addresses who may apply for an equalization and when the application can be made. Section 7(1) expressly permits a former spouse to apply to the court to "determine any matter respecting the spouses' entitlement under s. 5".

[47] Significantly, s. 7(3) of the Family Law Act specifically permits an equalization application to be made up to two years following a divorce or up to six years following separation where there is no reasonable prospect of cohabitation, whichever is earlier. It is therefore apparent that the legislature contemplated that more than one of the s. 5 triggers will be present in many situations. Moreover, when ss. 7(1) and 7(3) are read in combination, it is clear that, subject to the limitation period, an application to determine a former spouse's equalization entitlement under s. 5(1) can be made following a divorce and that it need not be determined "when a divorce is granted".

[48] Mr. Okmyansky cited a number of cases as standing for the proposition that Canadian courts have consistently interpreted "former spouse" to mean a former spouse divorced in Canada: Rothgiesser v. Rothgiesser, supra; Jahangiri-Mavaneh v. Taheri-Zengekani (2003), 2003 CanLII 1962 (ON SC), 66 O.R. (3d) 272, [2003] O.J. No. 3018 (S.C.J.), revd on other grounds 2005 CanLII 17771 (ON CA), [2005] O.J. No. 2055, 14 R.F.L. (6th) 9 (C.A.); Wlodarczyk v. Spriggs, 2000 SKQB 468 (CanLII), [2000] S.J. No. 703, 12 R.F.L. (5th) 241 (Unif. Fam. Ct.); Dashtarai v. Shahrestani, [2006] O.J. No. 5367 (S.C.J. Fam. Ct.); Mercieca v. Mercieca, 2002 CanLII 2754 (ON SC), [2002] O.J. No. 4935, 32 R.F.L. (5th) 392 (S.C.J.). However, without exception, the cases upon which Mr. Okmyansky relies have to do with the jurisdiction to entertain proceedings under the Divorce Act. None of them relates to the interpretation of "former spouse" in s. 7 of the Family Law Act. [See Note 2 below] Moreover, I reject the submission that these cases should be applied to the interpretation of "former spouse" in s. 7 of the Family Law Act.

[49] As I have explained, there is a clear rationale for narrowly interpreting the provisions of the Divorce Act that govern the circumstances in which corollary relief orders and variation orders can be made in favour of a former spouse under that Act. The rationale relates primarily to the scope of the jurisdiction Parliament has historically chosen to exercise in the field of divorce. I see no similar rationale for interpreting "former spouse" in s. 7 of the Family Law Act as referring only to former spouses who were divorced in Canada. On the contrary, in my view, such an interpretation would make no sense.

[50] Section 15 of the Family Law Act sets out the conflict of laws rule to be applied to the property rights of spouses arising out of the marital relationship. It provides that they are to be governed by the internal law of the place "where both spouses had their last common habitual residence".

[51] If "former spouse" in s. 7 were interpreted as referring only to former spouses who were divorced in Canada, it would mean that a person living in Ontario whose property rights are governed by Ontario law would have no remedy in Ontario concerning Ontario property where the person's spouse is able to obtain a divorce in a foreign jurisdiction. This would be the case even though the property issues were not dealt with in the foreign proceedings. In my view, such a result is inconsistent with the legislative intent expressed in the conflict of laws provision (s. 15) and would make no sense.

[52] I therefore reject Mr. Okmyanksy's submission that "former spouse" in s. 7 refers only to former spouses who were divorced in Canada.

VII. Disposition

[53] Based on the foregoing reasons, I would allow the appeal in part, set aside the trial judge's order declining to stay Ms. Okmyansky's application and substitute an order staying her support claims only. As success on the appeal is divided, I would make no order as to the costs of the appeal.

Appeal allowed in part.

Notes

Note 1: In England, the Matrimonial and Family Proceedings Act 1984 (U.K.), which is seperate from the divorce legislation, the Matrimonial Causes Act 1973 (U.K.), permits English courts to order support following a foreign divorce. However, it requires that leave of the court first be obtained, and leave may not be granted unless the court considers that there is substantial foundation for the making of such an order and that the enforcement mechanisms in the foreign jurisdiction have been exhausted. The parties must also have a genuine connection to England. Moreover, even if the jurisdictional requirements are satisfied, the court is required, before making an order, to consider whether England is the appropriate venue.

Note 2: Mercieca also addresses the jurisdiction to enteriain a support claim under the Family Law Act and, in that context, the interpretation of "spouse". It does not address the interpretation of "former spouse" in s. 7 of the Family Law Act.