Rothgiesser v. Rothgiesser

46 O.R. (3d) 577
[2000] O.J. No. 33
No. C31085
Court of Appeal for Ontario
Labrosse, Doherty and O'Connor JJ.A.
January 12, 2000

Family law -- Support -- Spousal support -- Jurisdiction -- Parties married, separated and divorced in South Africa -- Final divorce order incorporating agreement as to custody and child and spousal support -- Husband waiving his right to apply in any jurisdiction in world for decrease in spousal support payable to wife -- Husband bringing application for custody in Ontario in 1990 -- Application resolved on consent by order which also provided for increase in spousal support -- Husband applying in 1998 for order terminating spousal support -- 1990 spousal support order made without jurisdiction as jurisdictional requirements of s. 4 of *Divorce Act* not met -- Jurisdiction could not be conferred on court by consent of parties -- 1998 order made without jurisdiction -- Canadian court not having jurisdiction to vary foreign support order – *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 4

The parties were married, separated and divorced in South Africa. The final order of divorce incorporated an agreement as to custody and child and spousal support. The wife waived her right to apply in any jurisdiction in the world for an increase in spousal support, and the husband waived his right to apply in any jurisdiction in the world to decrease spousal support payable to the wife. The husband moved to Canada. In 1990, the husband brought an application for custody of one of the children, who had moved to Toronto to live with him. The application was resolved on consent by an order which also provided for an increase in spousal support payable to the wife. In 1998, the husband brought an application under the *Divorce Act* for an order terminating his spousal support obligations. The application was granted. The wife appealed.

Held, the appeal should be allowed.

The 1990 spousal support order was made without jurisdiction as the jurisdictional requirements of s. 4 of the *Divorce Act* were not met. Section 4 provided that only the court that granted a divorce to either or both former spouses had jurisdiction to subsequently determine a corollary proceeding. As the Ontario court had not granted a divorce to one or both of the parties, the Ontario court could not order support under the Act. Parties cannot empower a court to make a determination where it otherwise

has no authority to do so or where its authority is limited by statute. The limitation in s. 4 of the *Divorce Act* cannot be altered on consent of the parties.

The 1998 order was also made without jurisdiction. As the 1990 order was a nullity, it could not be the subject of a variation proceeding. Under the Act, a Canadian court can only vary a spousal support order made pursuant to a Canadian divorce; there is no jurisdiction in a Canadian court to vary a foreign support order. Jurisdiction to vary a foreign support order may only be derived from provincial legislation respecting enforcement of support orders, which did not come into play in this case. Furthermore, a Canadian court can only grant a variation of a support order of a Canadian divorce 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.

APPEAL from an order terminating spousal support.

Cases referred to *Byrn v. Mackin* (1983), 1983 CanLII 4468 (QC CS), 32 R.F.L. (2d) 207 (Que. S.C.); *Droit de la Famille -- 770 (Re)*, [1990] R.J.Q. 581 (S.C.); *Dulles Settlement (Re)*, [1950] All E.R. 1013, [1951] Ch. 265, 66 T.L.R. 1028, 94 Sol. Jo. 760 (C.A.); *Hinde v. Hinde*, [1953] 1 All E.R. 171, [1953] 1 W.L.R. 175 (C.A.); *Kalsi v. Kalsi* (1992), 1992 ABCA 182 (CanLII), 41 R.F.L. (3d) 201 (Alta. C.A.); *Lietz v. Lietz* (1990), 1990 CanLII 11406 (NB KB), 111 N.B.R. (2d) 128, 277 A.P.R. 128, 30 R.F.L. (3d) 293 (Q.B.); *Patterson v. Torrance* (1994), 1994 CanLII 11001 (MB CA), 92 Man. R. (2d) 116, 111 D.L.R. (4th) 477, 61 W.A.C. 116, 2 R.F.L. (4th) 74 (C.A.); *R. v. Litchfield*, 1993 CanLII 44 (SCC), [1993] 4 S.C.R. 333, 14 Alta. L.R. (3d) 1, 86 C.C.C. (3d) 97, 25 C.R. (4th) 137; *R. v. Wilson*, 1983 CanLII 35 (SCC), [1983] 2 S.C.R. 594, 26 Man. R. (2d) 194, 4 D.L.R. (4th) 577, 51 N.R. 321, [1984] 1 W.W.R. 481, 9 C.C.C. (3d) 97, 37 C.R. (3d) 97; *Smibert v. Smibert*, 1996 CanLII 7154 (SK KB), [1996] S.J. No. 496 (Q.B.); *Trotter v. Trotter* (1992), 1992 CanLII 8600 (ON SCDC), 90 D.L.R. (4th) 554, 40 R.F.L. (3d) 68 (Ont. Gen. Div.)

Statutes referred to *Children's Law Reform Act*, R.S.O. 1980, c. 68 -- now R.S.O. 1990, c. C.12; *Constitution Act, 1867*, ss. 91, 92; *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), ss. 2(1) (am. 1997, c. 1, s. 1), 3(1), 4 (am. 1993, c. 8, s. 1), 5(1), 15 (am. 1997, c. 1, s. 2), 17(1)(a); *Reciprocal Enforcement of Support Orders Act*, R.S.O. 1990, c. R.7

Authorities referred to Castel, *Canadian Conflict of Laws*, 4th ed. (Toronto: Butterworths, 1997), p. 417; Hovius, *Family Law: Cases, Notes & Material*, 4th ed. (Toronto: Carswell, 1996), p. 482; Payne, *Payne on Divorce*, 4th ed. (Toronto: Carswell, 1996)

Stephen M. Grant and Sarah M. Boulby, for appellant.
Malcolm C. Kronby, Q.C., for respondent.

The judgment of the court was delivered by

[1] LABROSSE J.A.: -- The appellant Shirley Rothgiesser appeals the judgment of Swinton J. dated November 10, 1998, which terminated the obligation of Claude Henry Rothgiesser to pay spousal support and medical benefits to the appellant. Notwithstanding that the parties are divorced, for ease of reference, I will refer to the appellant as "the wife" and to the respondent as "the husband".

Overview

[2] The parties were married, separated and divorced in South Africa. As part of the divorce judgment, they executed a "consent paper" which provided inter alia for custody and child and spousal support, including medical benefits. Subsequently, the husband settled in Ontario. On the consent of the parties, an order was obtained from the Ontario Court (General Division) ("the Ontario court") which dealt with custody and child and spousal support. Some years later, the husband brought an application for a variation of the order to provide that he had no further support obligation. The application was granted. The wife appeals on the grounds that the Ontario court had no jurisdiction to terminate the spousal support or in the alternative, that there was no merit to the husband's application.

The Facts

[3] The parties were married in 1967 in Cape Town, South Africa. They had three children: Stephen, born October 10, 1968; Stuart, born October 10, 1970; and David, born January 31, 1980.

[4] The parties separated in 1985 and were divorced pursuant to a final order of divorce of the Supreme Court of South Africa on August 5, 1985. The final order of divorce incorporated, as an order of the court, a "consent paper" dated July 16, 1985 which set out the terms of the settlement of the issues arising from the breakdown of the marriage, including custody and access (the wife had custody of the three children), and child and spousal support. The consent paper contained the following provisions for spousal support:

> 2.1 Subject to what is set forth hereunder, Defendant shall pay maintenance for Plaintiff personally at the rate of the rand equivalent of $U.S. 1000 per month until her death or remarriage, whichever event shall first occur. This sum shall be paid by Defendant to Plaintiff simultaneously with the maintenance in respect of

the minor children and in the manner set out in the second paragraph of sub-clause 1.1 above.

. . . . .

2.3 In addition to his obligations as set forth in sub-clause 2.1 above, but at all times subject to the contingencies therein contained and to the contingency contained in sub- clause 2.2, Defendant undertakes to bear the medical aid premium for Plaintiff's membership of either the Blue Shield or Blue Cross in the United States of America or the National Medical Plan in the Republic of South Africa provided that Defendant's liability in terms of this sub-clause will be limited only to the normal rates levied by such organizations from time to time (as opposed to a loaded premium for some reason or other).

. . . . .

3.2 The maintenance payable in respect of the Plaintiff shall be adjusted annually on the first day of July of each and every year commencing with effect from 1st July 1986, by the percentage increase/decrease in the Consumer Price Index for all urban consumers in the area in which Plaintiff will then be residing as published by the relevant governmental authority.

3.3 Plaintiff hereby waives for all time her right, both under Common Law and Statute and in any Court of any jurisdiction throughout the world, to apply for an increase in her personal maintenance, it being specifically agreed upon between the parties that the increases in Plaintiff's maintenance shall be limited to those increases as set forth in sub-clause 3.2 above. Defendant hereby similarly waives for all time his right, both under Common Law and Statute and in any Court of any jurisdiction throughout the world, to apply for a decrease in Plaintiff's personal maintenance. The intention of the parties is that, except as specifically hereinabove provided, the maintenance in respect of the Plaintiff is non-modifiable and Plaintiff with full knowledge of all the relevant circumstances accepts that her personal maintenance is reasonable and will not be capable of being modified other than as herein provided.

When referring to both the final order of divorce and the consent paper, I will refer to them as the "South African divorce judgment".

[5] Shortly after the divorce, in August 1985, both the husband and the wife relocated separately to San Diego, California. In 1987, the husband moved to Toronto.

[6] On April 11, 1988, upon the motion of the husband, the Superior Court of California for the County of San Diego "awarded the joint legal and joint physical

custody" of Stuart and David, who were residing in California with the wife, to the parties. The order, dated May 16, 1988, provided that all other custodial provisions of the South African divorce judgment remained in full force and effect. In the same proceedings, the wife brought a motion to increase child and spousal support. By order dated October 21, 1988, the court found that the current level of child support was reasonable, and held that the spousal support as ordered by the South African divorce judgment "is non modifiable either by Petitioner or Respondent . . . in any jurisdiction throughout the world". Accordingly, the wife's motion was dismissed in its entirety.

[7] In September 1990, the youngest child David moved to Toronto to live with the husband. The husband brought an application for his custody pursuant to the *Children's Law Reform Act*, R.S.O. 1980, c. 68 as amended. The application was resolved on consent by the order of Lang J. dated September 27, 1990 which provided, inter alia, that David shall primarily reside with the husband with specific access provisions for the wife. In addition to matters relating to custody, access and child support, the order provided in para. 4 states:

> THIS COURT ORDERS that spousal support shall be paid to the respondent by the applicant in the sum of $1,600.00 United States Dollars per month, commencing September 1, 1990, and due and payable on the first day of each month thereafter. Support shall continue at this amount until whichever of the following shall first occur:
>
> (a) June 30, 1995;
>
> (b) Respondent ceases to actively continue her education leading towards obtaining residency in the United States of America.
>
> (c) Respondent becomes employed on a full-time basis.
>
> Upon the occurrence of any of the events described above, the amount of spousal support shall be reduced to the sum of $1,200.00 United States Dollars per month, said amount to be deemed the base figure upon which any future increase/ decrease in spousal support are to be made pursuant to paragraph 3.2 of the South African Divorce Decree on file and recognized herein, to be payable until death, remarriage, or cohabitation with an unrelated male person as described in paragraph 2.2 of the South African Divorce Decree.

[8] The husband complied with the terms of the order until 1994.

[9] In July 1994, the husband reduced the monthly spousal support to $1,200 U.S. In his affidavit in support of his motion which is the subject-matter of this appeal, he

alleged that he learned that the wife had been employed full time and that medical coverage had been available to her through her employment. He stated that he offset his overpayments against his ongoing support payments and that subject to this adjustment, he continued paying $1,200 per month.

[10] In 1995, David returned to live with the wife in California and the husband reinstated his child support payments. At the request of the wife, the husband increased child support payments for David by $200 U.S. per month. In July 1997, the wife and David returned to live in South Africa. In November 1997, the husband was informed that David was employed and he terminated the child support payments.

[11] By notice of application dated June 22, 1998, brought under the *Divorce Act*, R.S.C. 1995, c. 3 (2nd Supp.), the husband applied to the Ontario court for an order varying the "Order of Madam Justice Lang, dated September 27, 1990 . . . and the Consent Paper, dated July 16, 1985", by providing that he no longer had an obligation to pay spousal support to the wife. He was also seeking an order that he was no longer required to pay the wife's medical aid premiums pursuant to the consent paper. The wife filed an affidavit in response to the application. She took the position that no court was entitled to relieve the husband of his obligation to pay spousal support as provided in the South African divorce judgment. She also deposed that she was not possessed of the requisite funds to retain counsel to represent her, had not yet been able to obtain legal aid and intended to file a further affidavit in support of arrears of support based on the cost of living.

[12] On November 10, 1998, Swinton J. granted the husband's application. In a brief endorsement, she noted that, although duly notified, the wife had not appeared on the hearing of the application. She wrote:

> I have jurisdiction to deal with this variation application, given that the parties attorned to the jurisdiction of the court in 1990, section 5(1)(b) *Divorce Act* and it would be undue hardship for the applicant to deal with this matter in South Africa.

[13] As to the merits of the application, Swinton J. held that although the husband in his application did not seek relief with respect to child support, there had been a material change of circumstances which justified a termination of the child support order for David who was no longer a dependent child.

[14] Swinton J. further held that there had also been a material change of circumstances with respect to his spousal support obligation. She ordered that the order of Lang J. and the order of Tebbutt J. of the Supreme Court of South Africa, dated August 5, 1985 (the South African divorce judgment) be varied to provide that

the husband had no further obligation to pay spousal support and medical aid premiums to the wife.

[15] It is argued on behalf of the wife that Swinton J. erred in granting the husband's application for a variation of Lang J.'s order and the South African divorce judgment because the Ontario court did not have jurisdiction over this matter. It is also argued that, in any event, on its merits the application ought to have been dismissed.

The Relevant Legislation

[16] The relevant sections of the *Divorce Act* for the purposes of this appeal 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 support order or a custody order or both such orders;

. . . . .

"support order" means an order made under subsection 15(2);

"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 at least one year immediately preceding the commencement of the proceeding.

. . . . .

> 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.

> 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(1) In this section and section 16, "spouse" has the meaning assigned by subsection 2(1) and includes a former spouse.

(2) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring one 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 the support of

(a) 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 . . . .

Jurisdiction

[17] The issue of jurisdiction raises the following questions:

1. Did Lang J. have jurisdiction to make a spousal support order where the parties had been divorced in a foreign jurisdiction?

2. Could jurisdiction to determine spousal support be conferred on the Ontario court by the consent of the parties?

3. Did the Ontario court have jurisdiction to vary spousal support obligations pursuant to the Lang order or a foreign divorce judgment under s. 5 of the *Divorce Act*?

Brief Answer

[18] On the first question, it is my view that on September 27, 1990, Lang J. did not have jurisdiction to make a spousal support order ("the Lang order") because the

jurisdictional requirements of s. 4 of the *Divorce Act* (also referred to as "the Act") were not met. Section 4 provided that only the court that granted a divorce to either or both former spouses had jurisdiction to subsequently determine a corollary proceeding, i.e., a spousal support order. As the Ontario court had not granted a divorce to one or both of the parties, the Ontario court could not order support under the Act and, in so far as it provided for spousal support, the order was made without jurisdiction.

[19] This conclusion is unaltered by the husband's argument that the parties can confer jurisdiction on a court through consent (Question 2). The common law unanimously supports the general proposition that parties cannot empower a court with the authority to make a determination where it otherwise has no authority to do so or its authority is limited by statute. Section 4 limited a court's jurisdiction to entertain a proceeding relating to corollary relief to the specific court that has granted the divorce. This limitation cannot be altered on consent of the parties.

[20] With regard to the third question, on November 10, 1998, Swinton J. had no jurisdiction to vary the Lang order or the South African divorce judgment. As the Lang order was a nullity, it could not be the subject of a variation proceeding. Under the Act, a Canadian court can only vary a spousal support order made pursuant to a Canadian divorce: there is no jurisdiction on a Canadian court to vary a foreign support order. Jurisdiction to vary a foreign spousal support order may only be derived from provincial legislation respecting enforcement of support orders (in Ontario this is the *Reciprocal Enforcement of Support Orders*, R.S.O. 1990, c. R.7 (“the RESOA”)) which does not come into play in the present case. Swinton J. lacked jurisdiction to deal with the husband's application to vary the Lang order and the South African divorce judgment.

Analysis

[21] In light of the foreign elements and the effects thereof on the issue of jurisdiction, it is convenient to review the bare facts of the case.

[22] The wife and the husband were married in South Africa and divorced pursuant to a judgment of the Supreme Court of South Africa, on August 5, 1985, which incorporated as part of the divorce judgment a consent paper which settled, inter alia, custody and support issues.

[23] In 1990, the husband, who had moved to and established residency in Ontario, brought an application under the *Children's Law Reform Act* seeking custody of the youngest child, David. His application did not seek relief from his support obligations. On September 27, 1990, the Lang order granted the husband custody of David and conditionally increased his support obligation to the wife, who at the time was

residing in California. Both parties consented to the increase of support, notwithstanding that the South African divorce judgment specifically provided that the spousal support provision was non-variable. In 1998, the husband applied to vary the Lang order, seeking to terminate his spousal support obligations. On November 10, 1998 Swinton J. made an order ("the Swinton order") varying both the Lang order and the South Africa divorce judgment, terminating the husband's child and spousal support obligations.

[24] Although the wife seeks to set aside the Swinton order, it is only that part dealing with spousal support that is in issue in this appeal.

Question 1: Did Lang J. have jurisdiction to order spousal support?

[25] Before turning to Lang J.'s jurisdiction to make the order, it should be noted that as this is an appeal from the order of Swinton J., the attack on the order of Lang J. is a collateral attack. Generally speaking, collateral attacks on court orders are prohibited. They are, however, permitted where it is alleged, as it is here, that the order was made without jurisdiction: *R. v. Wilson*, 1983 CanLII 35 (SCC), [1983] 2 S.C.R. 594 at p. 599, 4 D.L.R. (4th) 577; *R. v. Litchfield*, 1993 CanLII 44 (SCC), [1993] 4 S.C.R. 333, 86 C.C.C. (3d) 97 at p. 109. The husband does not suggest that the wife cannot challenge Lang J.'s jurisdiction on this appeal.

[26] It must be remembered that the application before Lang J. had been brought under the *Children's Law Reform Act*. Lang J. had jurisdiction thereunder to deal with custody of David. However, there is no jurisdiction in that statute to deal with spousal support. Moreover, the two provincial statutes empowered to deal with spousal support cannot be relied on in the circumstances of this case. The application did not purport to be, nor could it have been, brought pursuant to the *Family Law Act*, R.S.O. 1990, c. F.2, as the parties were not spouses as required thereunder. Nor could the application be said to have been brought pursuant to the RESOA, as that procedure had not been invoked. That leaves only the federally enacted *Divorce Act* as the potential basis of jurisdiction for the spousal support order. In fact, counsel for the husband conceded on appeal that the Lang order could only have been made as a corollary relief order under the Act.

[27] Under the *Divorce Act*, there are only two ways to deal with spousal support: (a) as a corollary relief proceeding (s. 4) and (b) as a variation proceeding (s. 5). The proceeding before Lang J. could not be a variation proceeding of the South African divorce judgment for reasons that will become evident later under Question 3.

[28] On the basis of s. 4 and s. 15, the Act provides a court with jurisdiction to order spousal support as corollary relief. Section 15(2), which comes under the heading "Corollary Relief", provides that a court of competent jurisdiction may make an order

of spousal support. The resultant order, referred to and defined as a "support order", is identified in s. 2(1) as made pursuant to a "corollary relief proceeding". The relevant provision granting a court jurisdiction in corollary relief proceedings is s. 4, which for ease of reference, is once again reproduced:

> 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. [See Note 1 at end of document]

Thus, a court will have jurisdiction to hear and determine a corollary relief proceeding, and can therefore make a support order, provided it is the court that has also granted either or both parties their divorce. Clearly, the "court" can only be a Canadian court and would include the Ontario court where it was the court that granted the parties their divorce.

[29] I could find only three cases that have dealt with this issue and they all affirm that under s. 4 of the Act, a Canadian court is without jurisdiction to order corollary relief (i.e., spousal support) where the same court has not granted the parties a divorce: see *Lietz v. Lietz* (1990), 1990 CanLII 11406 (NB KB), 111 N.B.R. (2d) 128, 30 R.F.L. (3d) 293 (Q.B.); *Droit de la Famille -- 770 (Re)*, [1990] R.J.Q. 581 (S.C.) and *Kalsi v. Kalsi* (1992), 1992 ABCA 182 (CanLII), 41 R.F.L. (3d) 201 (Alta. C.A.).

[30] In my view, the Lang order can only purport to have been made pursuant to s. 15(2) of the Act and consequently, jurisdiction to make that order must be derived from s. 4. On the facts of this case, the jurisdictional requirement mandating that only the court that granted the divorce is empowered to order support was not met, nor could it be met. The Ontario court was not the court that granted the parties their divorce. The Lang order failed to meet the jurisdictional requirement necessary to determine a corollary relief proceeding and the order was made without jurisdiction.

Question 2: Can consent confer jurisdiction?

[31] The husband argues that, in any event, Lang J. had jurisdiction to make the spousal support order because in 1990, both parties accepted the jurisdiction of the Ontario court. He also argues that by availing herself of the jurisdiction of the Ontario court to increase spousal support the wife cannot now, after having collected the increased payments for the last eight years, challenge the jurisdiction of the Ontario court to make the order.

[32] The wife challenges this position on the basis that consent cannot confer jurisdiction. She argues that the fact that the order was made with the consent of both

parties is irrelevant to the determination of whether the Ontario court had jurisdiction to make the order and whether the order is valid.

[33] No authority was cited in support of the husband's position. In my view, the assertion that the parties cannot confer jurisdiction on a court where it otherwise lacks subject-matter jurisdiction is unequivocally correct.

[34] Halsbury's Laws of England, 4th ed., p. 326, states the general principle as follows:

> Where, by reason of any limitation imposed by statute, charter or commission, a court is without jurisdiction to entertain any particular action or matter, neither acquiescence nor the express consent of the parties can confer jurisdiction upon the court . . . .

[35] The author cites as authority a long line of cases dating back to 1750. The case law generally affirms, as stated in *Re Dulles Settlement*, [1950] All E.R. 1013 (C.A.) at p. 1015, that "no amount of submission on the part of an individual will operate to extend jurisdiction which Parliament has thought fit to limit".

[36] In *Cornwall (Township) v. Ottawa and New York Railway Co.* (1916), 1916 CanLII 614 (SCC), 52 S.C.R. 466, it was argued that there was no right of appeal from a decision of the Municipal Board. The question was whether in taking part in an appeal to the Court of Appeal of Ontario without objection, a party had waived the right to object to the jurisdiction of the Supreme Court of Canada to hear the appeal. Duff J. speaking for himself as a member of the majority (no member of the court disagreed with him on the issue of consent) said [at pp. 496-97]:

> First, it is said to be a case for the application of the maxim consent cannot give jurisdiction. This, of course, simply begs the question. Consent can give jurisdiction when it consists only in waiver of a condition which the law permits to be waived, otherwise it cannot. Where want of jurisdiction touches the subject matter of the controversy or where the proceeding is of a kind which by law or custom has been appropriated to another tribunal then mere consent of the parties is inoperative. No consent, for example, could give the Supreme Court of Ontario jurisdiction to hear a petition for determining the right to a seat in Parliament.

[37] Further, in a factually similar case to the present appeal, the English Court of Appeal in *Hinde v. Hinde*, [1953] 1 All E.R. 171, [1953] 1 W.L.R. 175 (C.A.) dealt with an appellate challenge to a court's jurisdiction that had earlier made a consent order setting out maintenance obligations. The husband had paid the wife support payments pursuant to the consent order, but upon his death his estate discontinued payment. The wife brought an application against the estate seeking payment on the

basis that it was the parties' intention, as reflected in the order, that the payments would survive the husband's death. It was argued on behalf of the estate that the jurisdiction of the court was limited by statute to order payment during the joint lives of the parties, regardless of whether the parties or the court in its order had so intended. Further, it was argued that, at the very least, there was no power in the court to enforce the order. The members of the court, both explicitly and by implication, applied the principle that parties could not by consent give the court a jurisdiction which it did not otherwise possess and dismissed the wife's appeal. (See also *Byrn v. Mackin* (1983), 1983 CanLII 4468 (QC CS), 32 R.F.L. (2d) 207 (Que. S.C.) for the proposition that parties are bound by the jurisdictional requirements of s. 4(1)(b) of the Act and cannot confer jurisdiction by consent and *Patterson v. Torrance* (1994), 1994 CanLII 11001 MB CA), 111 D.L.R. (4th) 477, 2 R.F.L. (4th) 74 (Man. C.A.) where again in a family law context, the court confirmed that "parties cannot confer jurisdiction on the court where the court does not otherwise have jurisdiction".)

[38] In the present case, as discussed above, s. 4 of the Act limits a court's jurisdiction to determine a corollary relief proceeding (support order) to the court that has granted the divorce. This limitation cannot be altered on consent of the parties: it is a condition that must be satisfied before a court can avail itself of the jurisdiction provided by the statute.

[39] In summary, the fact that the parties consented to the Lang order or abided by it for some years cannot overcome the determinative fact that in failing to satisfy the s. 4 requirement of being the court that granted the divorce, the Ontario court lacked jurisdiction to order spousal support. As a consequence, the spousal support obligations in para. 4 of the Lang order are a nullity.

Question 3: Did Swinton J. have jurisdiction to vary spousal support obligations?

[40] There is no dispute that the application before Swinton J. was a variation proceeding. It purported to vary both the Lang order and the South African divorce judgment. In my view, it could do neither for the following reasons.

[41] Swinton J. purported to take jurisdiction under the Act and identified s. 5 as the statutory basis enabling her to determine the variation proceeding before her. Section 5 of the Act provides:

> 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.

[42] In my view, there are three premises that underlie this provision: first, the support order from which variation is being sought is valid; second, the support order has been made by a Canadian court pursuant to the *Divorce Act*; and third, which is part and parcel of the second requirement, there must be a Canadian divorce from which the power to vary an order or corollary relief can derive.

[43] The first premise is self-evident. A support order must be valid before a court can vary it. A court can only vary an order that was made with jurisdiction in the first place as the power to vary cannot be substantively wider than the power to make the order. The effect of my conclusion to Question 1 that the part of the Lang order dealing with spousal support was made without jurisdiction and is a nullity is that the husband's application for variation of the Lang order must be dismissed. Swinton J.'s variation of the Lang order must be set aside.

[44] There remains to be determined whether the parts of the Swinton order varying the South African divorce judgment dealing with spousal and child support and the wife's medical premiums must be similarly set aside. As stated earlier, the husband's application to vary did not seek relief from child support obligations. Swinton J., nevertheless, ordered a variation and declared that the husband had no further child support obligations to the wife. As also stated earlier, child support has not been raised as an issue in this appeal.

[45] Dealing with the second and third premises underlying s. 5, they flow from the interpretation of the wording of the statute. Pursuant to s. 17, a court of competent jurisdiction can make an order varying a support order. A support order is a defined term in the statute (s. 2(1)) and means an order made under s. 15(2). Pursuant to s. 15(2), a support order can only be made by a court of competent jurisdiction, which in accordance with s. 4 necessarily means the court that granted the divorce. The court that granted the divorce must be a Canadian court because under the Act, only a court in a province, also a defined term in the statute (s. 2(1)), can grant a divorce (s. 3(1)). Thus, both the order and the divorce upon which it is premised, must have a Canadian identity. There is both academic commentary and caselaw to support this conclusion.

[46] Professor Castel in Canadian Conflict of Laws, 4th ed. (Toronto: Butterworths, 1997) at p. 417, states that pursuant to the *Divorce Act* Divorce Act "the right to corollary relief comes into existence at the time of the divorce". Professor Hovius in his text Family Law: Cases, Notes & Material, 4th ed. (Toronto: Carswell, 1996) at p. 482, states that "[a]s the Parliament of Canada's jurisdiction over support is ancillary to its legislative jurisdiction over divorce, the power to order support under the *Divorce Act* will cease if the court refuses to grant the divorce". The inference is that a Canadian divorce must be granted before an Ontario court can order support

under the Act. Finally, Professor Payne in his text Payne on Divorce, 4th ed. (Toronto: Carswell, 1996) states that "Section 5 of the *Divorce Act* confers no jurisdiction on any Canadian Court to vary a foreign support order, although such jurisdiction may be exercisable under provincial legislation respecting reciprocal enforcement of support orders." Thus, according to these commentaries, s. 5 must be read as conferring jurisdiction on Canadian courts to vary Canadian support orders made pursuant to the Act.

[47] No Canadian cases were cited and I could find none, where a court has varied a foreign divorce or foreign support order under the *Divorce Act.* On the contrary, on occasions where it has been tried, the application has been rejected and the courts have named the provincial reciprocal enforcement legislation as the appropriate approach. There are two cases on point.

[48] In *Trotter v. Trotter* (1992), 1992 CanLII 8600 (ON SCDC), 90 D.L.R. (4th) 554, 40 R.F.L. (3d) 68 (Ont. Gen. Div.), Greer J. dismissed the wife's application to vary a support order of an English court on the basis that she had no jurisdiction to do so under the *Divorce Act*. The parties were married and divorced in England. The husband moved to the United States with one child of the marriage and the wife moved to Ontario with the second child. Greer J. reasoned that under the Act she did not have jurisdiction to vary an English divorce judgment because the Trotter divorce was not granted under the Act, and therefore, could not be varied by our courts unless the Attorney General selected this court upon application of the wife under the RESOA. She went on to explain that the RESOA provided a vehicle by which support orders from reciprocating states could be enforced. As no such application had been made, the wife's application was dismissed.

[49] Similarly, in *Smibert v. Smibert*, 1996 CanLII 7154 (SK KB), [1996] S.J. No. 496 (Q.B.) the question arose as to whether s. 5 of the Act could provide the jurisdictional basis to vary a foreign order. Laing J. found that "the law seemed fairly clear that s. 5 applies only to orders made under the *Divorce Act* . . .". He held that he had "no jurisdiction to vary the terms of [an Alabama] order, unless it can be done pursuant to" the RESOA, which it could not as the foreign divorce was not registered as required by the statute.

[50] Parliament has no jurisdiction to pass legislation authorizing spousal support except when ancillary or corollary to a divorce. Section 5(1)(b) speaks of the ability of a former spouse to apply for a variation in a different province from the one which granted the divorce judgment. It is not intended to permit the variation of a foreign divorce judgment. The legislative or statutory scheme for addressing variations of foreign support orders is the RESOA.

[51] In my opinion, Swinton J. clearly could not derive her jurisdiction to vary the South African divorce judgment from s. 5 of the Act, as she did, and her order cannot stand. There is no jurisdiction to vary a foreign divorce. This is why, as stated earlier, the Lang order could not be a variation.

The Merits of the Application Before Swinton J.

[52] As an alternative ground of appeal, the wife argues that, on its merits, the husband's application ought to have been dismissed. In light of my disposition of the issue of jurisdiction, it is not necessary to deal with this ground of appeal. However, I wish to make some brief comments on this issue.

[53] Following an 18-year traditional marriage, the parties entered into an agreement pursuant to which the parties waived for all times their right to apply for a variation of spousal support except for certain specific conditions that do not apply in this case.

[54] The husband has sworn to changes in his income and to the state of his health. The wife has sworn to little change, if any, in her income and that she could not afford to retain counsel on the application. The variation was essentially granted by default, on the basis of untested affidavits and financial information.

[55] Even disregarding the non-variable provision of their agreement, it remains that the husband enjoys a much higher standard of living than the wife. He has a valuable residence and access to a family fund. Counsel for the wife argued that the spousal support payments represented 86 per cent of the wife's income. She swears that she has no assets. Swinton J. noted that it would be undue hardship for the husband to go to South Africa to deal with this matter. It would be no less of a hardship for the wife to come to Ontario.

[56] In my view, on the basis of this record, there was no cogent evidence that the parties had experienced a material change of circumstances. The termination of spousal support payments may have caused her severe hardship.

The 1993 Amendment

[57] The effect of this decision is that under the *Divorce Act* a Canadian court, which includes the Ontario court, only has jurisdiction to determine a corollary relief proceeding, i.e., a support order, if the court has granted a divorce to either or both former spouses. Furthermore, a Canadian court can only grant a variation of a support order of a Canadian divorce 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.

[58] In these reasons, I referred to s. 4 of the *Divorce Act* as it read in 1990 at the time of the Lang order. I also mentioned that s. 4 was amended as of March 25, 1993. I repeat the 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, 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 ordinary residence in a Canadian province." The implication of this view is great and thus merits correction.

[59] 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, 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"). This assertion also supports and strengthens the conclusion that I have reached on the issue of the jurisdiction of an Ontario court to make an order in the absence of a Canadian divorce.

Disposition

[60] In the result, the appeal is allowed and the order of Swinton J., in so far as it relates to spousal support, is set aside. Since the mutual consent to the Lang order is in large part the cause of this dispute, there will be no order as to costs.

Appeal allowed.

Notes

Note 1: Section 4 is reproduced as it stood in 1990 at the time of the Lang order and all references refer to the section as it read before amendment. I will comment on the amendment, which took effect on March 25, 1993, later in my reasons.