
CANADA / JUDGMENT

Cockerham v. Hanc

2014 BCSC 2432

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Supreme Court of British Columbia

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2014 BCSC 2432 Cockerham v. Hanc

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cockerham v. Hanc,

2014 BCSC 2432

Date: 20141223

Docket: 50274

Registry: Kamloops

Between:

Crystal Dawn Cockerham

Claimant

And

Kristopher Ryan Hanc

Respondent

Before: The Honourable Madam Justice Donegan

Reasons for Judgment

Counsel for the Claimant:

J.H. Grover

Counsel for the Respondent:

S.L. Booth

Place and Date of Hearing:

Kamloops, B.C.

November 7, 2014

Place and Date of Judgment:

Kamloops, B.C.

December 23, 2014

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I INTRODUCTION

[1] This is a family law case involving a couple who lived in a marriage-like relationship in Ontario. When they separated, Ms. Cockerham moved to Kamloops, British Columbia. Three months later she commenced this action, seeking spousal support and a division of family property and debt pursuant to the provisions of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. There are two applications before me.

[2] Mr. Hanc seeks an order pursuant to the Supreme Court Family Rules, B.C. Reg. 169/2009 [Family Rules] that this case be dismissed or stayed, either on the grounds that this court does not have jurisdiction or that the court ought to decline to exercise its jurisdiction. He further seeks a declaration that any entitlement to and determination of spousal support falls within the scheme set out in the Interjurisdictional Support Orders Act, S.B.C. 2002, c. 29 [ISOA], as well as other, alternative relief and special costs.

- [3] Should the court find it has jurisdiction and then see fit to exercise it, Ms. Cockerham applies for retroactive interim spousal support and costs.

II PRELIMINARY REMARKS

(a) Fact Finding

- [4] The joint application record includes five affidavits: two from Ms. Cockerham and three from Mr. Hanc. Although there are some areas of agreement, I must highlight how differently the parties view and characterize their seven-year relationship. Ms. Cockerham describes a committed, continuous, and forward-looking relationship, while Mr. Hanc portrays a less stable, financially independent one. No cross-examination was sought by either party. Although fact finding is a challenge in these circumstances, I am satisfied, given the issues I am to decide, that I am able to make the necessary factual findings.

(b) Objections to Admissibility

- [5] Mr. Hanc raises objections to the admissibility of certain aspects of Ms. Cockerham's affidavit evidence. Those objections can be grouped into two general categories: hearsay and relevancy. With respect to the former, insofar as any of Ms. Cockerham's evidence references statements made by others (other than Mr. Hanc) that are offered for their truth, they are inadmissible and will not be considered. Certain aspects of the evidence offered by both parties are not relevant, as these reasons will disclose.

III BACKGROUND FACTS

- [6] The parties are in their 30s. They have no children. Mr. Hanc is a lawyer in Toronto. Ms. Cockerham has a medical degree and is currently looking for a residency position. She lives with her mother in Kamloops.
- [7] The parties met in 2006 and, although living and working in different cities in Ontario, began dating in 2007. In the summer of 2007, Ms. Cockerham moved into Mr. Hanc's residence, his condominium, in Toronto. Mr. Hanc was called to the Ontario bar in the fall of 2007 and continued employment at the firm with whom he had articulated. Ms. Cockerham tried to maintain her employment, but the distance now involved became prohibitive. She found work in Toronto in January of 2008, but lost it due to downsizing in January of 2009.
- [8] From this point until later in 2010, the parties view their relationship quite differently. Mr. Hanc deposes to two periods of separation that saw Ms. Cockerham move out of his residence. Ms. Cockerham denies any separations. They agree that they were together as a couple, residing in Mr. Hanc's condominium in late 2010, when Ms. Cockerham was accepted to medical school at the University of Sint Eustatius in Sint Eustatius, an island in the Caribbean. Ms. Cockerham says the decision for her to attend medical school was a joint one, with Mr. Hanc encouraging her to pursue a career of this nature. She says that he encouraged her to pursue this accelerated program so that they could start their lives and have children together.

- [9] In order to attend this university, Ms. Cockerham needed a substantial student loan. In December of 2010, Ms. Cockerham and Mr. Hanc both signed a student credit loan agreement with the Royal Bank of Canada ("RBC") for \$150,000.00 ("Royal Credit Line Agreement for Students"). Ms. Cockerham describes this loan as a joint financial venture to pay for her sizeable tuition and living expenses, as well as miscellaneous joint expenses. She claims these joint expenses consisted of travel and gifts, including a \$5,000.00 watch she purchased for Mr. Hanc. Mr. Hanc takes an entirely different view of this loan. He says that he co-signed only as a favour to Ms. Cockerham, with no expectation that he would have to repay any part of it. Contrary to Ms. Cockerham's assertions, Mr. Hanc says that he did not have access to or use any of the funds.
- [10] Ms. Cockerham lived and studied in Sint Eustatius from January 2011 until approximately April of 2012, when she completed her degree. During that time, Mr. Hanc travelled to Sint Eustatius twice and Ms. Cockerham travelled back to Toronto periodically.
- [11] Their commitment to one another while Ms. Cockerham studied abroad was demonstrated over the Christmas season of 2011 when Mr. Hanc proposed marriage. He presented Ms. Cockerham with a very expensive engagement ring. She accepted his proposal.
- [12] From April to October 2012, the couple again lived together in Mr. Hanc's Toronto condominium. Mr. Hanc continued to work as an associate lawyer and Ms. Cockerham studied for her medical licensing examinations. She successfully completed those examinations in September of 2012.
- [13] From October 2012 until December 2013, Ms. Cockerham lived in Atlanta, Georgia, where she worked at mandatory clinical rotations. During that time, the couple visited one another periodically. They spent lavishly on travel, dining out, and gifts.
- [14] In March of 2013, the parties co-signed an agreement to increase the Royal Credit Line Agreement for Students to \$200,000.00. The spending continued and the balance now stands at \$199,999.34.
- [15] Following completion of her clinical rotations in Atlanta in late 2013, Ms. Cockerham returned to live with Mr. Hanc in his Toronto condominium. Upon her arrival, Ms. Cockerham learned that Mr. Hanc had purchased a home in Mississauga without her input. They continued to discuss wedding plans. An extended family vacation at that time ultimately put an end to their relationship in either early January 2014 (Mr. Hanc's version), or late February 2014 (Ms. Cockerham's version).
- [16] Both parties allege mental abuse and angry behaviour by the other during the relationship. Ms. Cockerham alleges two incidents of physical violence, which Mr. Hanc denies or asserts no recollection. I am unable to resolve these contested facts in this setting, but am satisfied it is unnecessary to do so given the issues I am to decide.

- [17] In early 2014, Mr. Hanc took possession of the Mississauga home. Ms. Cockerham remained living in the Toronto condominium. She continued her studies and completed a one-month rotation in February 2014 at a Toronto hospital.
- [18] Following the breakdown of their relationship, Ms. Cockerham found herself with nowhere to live. Although she had a medical degree from Sint Eustatius, she was, and is, unlicensed to practise medicine in Canada or the United States until completion of residency training, a minimum of three years. With nowhere to stay in Ontario, Ms. Cockerham moved to Kamloops in March of 2014. She moved in with her mother and step-father and remains living with them. Mr. Hanc paid for her trip to Kamloops.
- [19] It is uncontested that since 2005, Ms. Cockerham has had strong family connections in Kamloops. She continues to have a solid network of family and friends here that provide both financial and emotional support to her. Ms. Cockerham has been actively searching for employment in Kamloops, without success thus far. She plans to apply for residency positions that would commence in the summer of 2015, most likely in the United States. She plans to return to Kamloops upon completion of her residency and set up a medical practice.
- [20] Mr. Hanc continues to live and work in Toronto. As an associate lawyer, he earns \$270,000.00, plus a potential discretionary bonus each year. His Toronto condominium is listed for sale. He resides in the Mississauga home, which he is currently renovating. Mr. Hanc has no ties to British Columbia. He has never lived here, owns no property here and has only travelled to this province once, on business for less than 24 hours.
- [21] After the relationship ended, Mr. Hanc retained counsel in Ontario who attempted to resolve the outstanding matters arising from their relationship. Ms. Cockerham responded by commencing this action on June 13, 2014.
- [22] In her claim, Ms. Cockerham seeks spousal support, retroactive to the date of separation, and orders relating to family property and family debt, pursuant to the provisions of the FLA. With respect to the division of family property and debt, Ms. Cockerham specifically seeks the following:
1. An equal division of family assets under the FLA, including the Toronto condominium and the Mississauga home;
 2. An interest in the following property:
 - a) any and all assets in the sole name of the claimant or respondent, in the joint names of the claimant and the respondent, any assets held in trust for the benefit of the claimant and/or the respondent, including but not limited to chattels, pensions, RRSPs, insurance, savings, business interests, options, shares, real estate, club memberships and the like, located in and outside of British Columbia;

- b) a division or allocation of the claimant's debts, including the Royal Credit Line Agreement for Students borrowed by the claimant and the respondent and which has a current balance outstanding of approximately \$200,000.00.

[23] She seeks the following additional orders:

1. The claimant is applying for an order that both parties be restrained and enjoined from
 - (a) disposing of, transferring, encumbering, assigning or dissipating any assets as may be owned by himself or herself whether legally or beneficially pending trial of this action, or
 - (b) charging credit on any credit card, line of credit or other credit facility on which the other is also liable,

without the written agreement of the parties or further order of this court, and without any undertakings by either party as to damages.

[2]. The claimant is applying for a determination of the family assets and family debts.

[3]. The claimant is applying for an order dividing or allocating the Claimant's debts, including the Royal Bank Royal Credit borrowed by the Claimant and the Respondent and which has a current balance outstanding of approximately \$200,000.00.

[4]. The claimant is applying for a declaration of ownership and possession of such family assets as may be appropriate under the circumstances.

[5]. The claimant is applying for an order that such property of the respondent as may seem just and reasonable to this Court be vested in the claimant.

[6]. The claimant is applying for an Order for partition or sale of property.

[24] Mr. Hanc filed a jurisdictional response on July 18, 2014, disputing this court's jurisdiction over him, or the property owned by him, in respect to the claims made in this action. On August 28, 2014, Mr. Hanc filed his response to family claim, again objecting to this court's jurisdiction and, if jurisdiction is found, objecting to all of the relief sought.

IV POSITIONS OF THE PARTIES - JURISDICTION

[25] The first issue I must determine is whether this court has jurisdiction over the matters in issue in this action and, if so, whether it should decline jurisdiction in favour of Ontario. In summarizing the positions of the parties, I do not intend to detract from their very thorough submissions.

[26] Mr. Hanc submits that the appropriate forum for these issues to be decided is Ontario. The parties resided in Ontario until their separation, when Ms. Cockerham moved to Kamloops. Mr. Hanc has no ties to British Columbia and owns no property here. He is not, and has never been, a resident of British Columbia. He has no connection to this province. With respect to Ms. Cockerham's claim for spousal support, Mr. Hanc submits that it must be claimed pursuant to the provisions of the ISOA. The FLA, he submits, does not empower a

British Columbia court to make an original order for support against a non-resident.

- [27] With respect to the claim for division of family property and debt, Mr. Hanc asserts that there is no real and substantial connection between British Columbia and the facts on which the proceeding against him is based. As such, he submits that this court lacks territorial jurisdiction under either the provisions of the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 [CJPTA] or the FLA. In the alternative, if the court determines that it does have jurisdiction in respect of this claim, Mr. Hanc submits that this court ought to decline jurisdiction in favour of Ontario.
- [28] Ms. Cockerham submits that this court has jurisdiction over the issues in this case pursuant to the provisions of the FLA and/or the CJPTA. She stresses the overall object of the Family Rules and highlights that the FLA has altered the legal landscape in British Columbia, particularly for common-law couples and division of family property and debt. With respect to her claims relating to property and debt, she submits that the new provisions in the FLA expressly confer jurisdiction where either spouse is a habitual resident of British Columbia at the time the claim is brought. As such a resident, she says this court does have jurisdiction over her claims in respect of family property and debt. She also asserts that a real and substantial connection exists between British Columbia and the facts of this case.
- [29] With respect to her spousal support claim, Ms. Cockerham submits that it too ought to be decided under the FLA in this jurisdiction, heard at the same time as her property and debt claims. The ISOA is a slow and cumbersome mechanism that she says is inconsistent with the Family Rules.
- [30] Finally, Ms. Cockerham submits that should this court find it has jurisdiction, it ought to exercise it. She describes her claims as "modest". As a person of limited means currently, she would be unable to pursue this litigation in Ontario. To decline jurisdiction in these circumstances in favour of Ontario would not, she argues, be consistent with the object of the Family Rules.

V. ANALYSIS - JURISDICTION

- [31] The burden of establishing territorial competence or jurisdiction of this court rests with the party seeking to establish its existence: *Aleong v. Aleong*, 2013 BCSC 1428 at para. 80.
- [32] The starting point for determining whether this court has territorial competence or jurisdiction is Part 2 of the CJPTA. In the absence of other legislative provisions expressly conferring or denying territorial competence, the CJPTA is a complete code for determining questions of jurisdiction of this court: ss. 2(2) and 12 of the CJPTA: *Blackedge Strategic Capital and Consulting Ltd. v. Spelliscy*, 2008 BCSC 1217 at para. 15.
- (a) Claim for Division of Family Property and Family Debt
- i) FLA

- [33] With respect to Ms. Cockerham's claim for division of family property and family debt, the FLA contains new provisions that expressly confer territorial competence on this court in certain circumstances.
- [34] The FLA, in force since March of 2013, introduced a number of significant changes to family law in British Columbia. These changes include a new approach to division of family property and debt, set out in Parts 5 and 6 of the FLA. In "Reconstructing Domestic Relations: Improvements and Innovations in British Columbia's New Family Law Act" (2014) 33 Can. Fam. L.Q. 353, John-Paul Boyd summarized these changes well as follows:

The new Act provides a partnership of acquests property regime at Parts 5 and 6, in which spouses share in property acquired after the commencement of their relationship - the earlier of the date of cohabitation or marriage - rather than the deferred community of property regime prescribed by the Family Relations Act. Perhaps more significantly, the Act's provisions for the division of property and debt apply to both to [sic] married spouses and to persons who have cohabited in a marriage-like relationship for at least two years.

- [35] Part 5 of the FLA - Property Division, is organized into six divisions. Division 1 - General Rules, contains ss. 81 and 82. Section 81 sets out that spouses (which now includes common-law couples) are entitled to share family property and assume responsibility for family debt (a new concept) owned by one or both of them at the time of separation, regardless of their respective use or contribution. The date of the parties' separation is the triggering event - the date upon which each spouse is presumed to have a one-half interest in family property.
- [36] Division 2 - Determining Family Property and Family Debt, contains ss. 83 through 87. Section 84 defines "family property" (the property that is subject to a presumptive equal division) broadly, as all real and personal property which is owned by either spouse at the time of separation, or property acquired by either spouse after separation, but which is derived from property owned prior to separation. Section 85 lists excluded property, which includes property acquired before the commencement of the relationship, as well as other property. As explained by the Ministry of Justice in the Family Law Act Transition Guide (Vancouver: Continuing Legal Education Society, 2012), s. 84 of the FLA sets out a regime that classifies all of the spouses' debt and property at separation as family property unless it is excluded property under s. 85. Under this regime, many of Mr. Hanc's assets including the Mississauga home could be found to be family property.
- [37] Division 3 - Before Agreement or Final Order is Made, contains ss. 88 through 91. This division outlines certain orders which may be made before a division of property or debt is finalized by agreement or court order, including interim distribution of property.
- [38] Division 4 - Dividing Family Property and Family Debt, contains ss. 92 through 97. Section 95 allows a court to order an unequal division of family property or debt, or both, if equal division would be "significantly unfair", setting out factors a court may consider in this assessment. Of interest to the case at bar, while the FRA was silent on how property division should interact with spousal support, s. 93(3) of the FLA specifically allows the court to use

an unequal division of property to compensate for situations where spousal support is insufficient to meet the objectives of a spousal support award.

- [39] Division 5 - Enforcing and Protecting Property Interests, contains ss. 98 through 104. As explained by the Ministry of Justice in the Family Law Act Transition Guide, Division 5 carries forward provisions for enforcing and protecting property interests by filing documents in the Land Title Office or personal property registry, as was seen in the FRA.
- [40] Division 6 - Jurisdiction and Choice of Law Rules, contains ss. 105 through 109 of the FLA. It is this division that is of significance to the jurisdictional issue in this case. The Ministry of Justice provided this general explanation of Division 6 at page 3-146 of the Family Law Act Transition Guide:

Explanation from the Ministry of Justice

When a dispute crosses borders, complex questions arise about where a claim for property division can or should be made (jurisdiction) and which province, state, or country's law governs the resolution of the dispute (choice of law). As families become increasingly mobile, more and more couples will have spent time outside British Columbia during their relationship and are more likely to have assets outside B.C.

This Division adds provisions to be used by the B.C. Supreme Court to decide whether it has jurisdiction to hear a property division case, when it should decline to exercise that jurisdiction, and which province, state or country's law should govern a dispute.

The provisions are based on the Uniform Jurisdiction and Choice of Law Rules in Domestic Property Cases adopted by the Uniform Law Conference of Canada in 1997. In 1998, the British Columbia Law Institute recommended that British Columbia adopt the Uniform Act because the common law is inconsistent with family law principles and is too complex and technical, which makes resolving these cases expensive and time-consuming.

- [41] Section 105 sets out definitions and interpretive guidance for Division 6. It provides:

Definitions and interpretation

105 (1) In this Division:

"extraprovincial property" means property located outside British Columbia.

"proper law of the relationship" means the proper law of the relationship as determined under section 107 [proper law of relationship].

- (2) For the purposes of this Division, spouses do not have a common habitual residence in a jurisdiction if they live separate and apart in the jurisdiction.

[42] Section 106 sets out the new rules for determining the "authority" of this court to make orders under Part 5. The word "authority" is not defined, but given its context, I take it to be synonymous with "jurisdiction". Section 106 provides:

Determining whether to act under this Part

106 (1) This section applies if an order respecting property division, respecting the same spouses, may be made in more than one jurisdiction.

- (2) Despite any other provision of this Part, the Supreme Court has authority to make an order under this Part only if one of the following conditions is met:
 - (a) a spouse has started another proceeding in the Supreme Court, to which a proceeding under this Part is a counterclaim;
 - (b) both spouses submit, either in an agreement or during the proceeding, to the Supreme Court's jurisdiction under this Part;
 - (c) either spouse is habitually resident in British Columbia at the time a proceeding under this Part is started;
 - (d) there is a real and substantial connection between British Columbia and the facts on which the proceeding under this Part is based.
- (3) For the purposes of subsection (2) (d), a real and substantial connection is presumed to exist if one or more of the following apply:
 - (a) property that is the subject of the proceeding is located in British Columbia;
 - (b) the most recent common habitual residence of the spouses was in British Columbia;
 - (c) a notice of family claim with respect to the spouses has been issued under the Divorce Act (Canada) in British Columbia.
- (4) Despite subsection (2), a court may decline to make an order under this Part if the court, having regard to the interests of the spouses and the ends of justice, considers that it is more appropriate for jurisdiction to be exercised outside British Columbia.
- (5) In determining whether to decline jurisdiction under subsection (4), the court must consider all of the following:
 - (a) [Repealed. 2014-9-15(b)].
 - (b) the relative convenience and expense for the spouses and their witnesses;
 - (c) if section 108 [choice of law rules] applies, the law to be applied to issues in the proceeding;
 - (d) the desirability of avoiding multiple proceedings or conflicting decisions in different courts or tribunals;

- (e) the extent to which an order respecting property or debt
 - (i) made in another jurisdiction would be enforceable in British Columbia, and
 - (ii) made in British Columbia would be enforceable in another jurisdiction;
 - (f) the fair and efficient working of the Canadian legal system as a whole;
 - (g) any other circumstances the court considers relevant.
- (6) A determination of authority under subsection (2) or of whether to decline jurisdiction under subsection (4) is to be made solely by reference to this section.

[43] Sections 107 and 108 set out the new choice of law rules for dividing family property and debt. They provide:

Proper law of relationship

107 The proper law of the relationship between the spouses for the purposes of section 108 [choice of law rules] is

- (a) the internal law of the jurisdiction in which the spouses had their most recent common habitual residence,
- (b) if the jurisdiction under paragraph (a) is outside Canada and is not the jurisdiction most closely associated with the relationship between the spouses, the internal law of the jurisdiction that is most closely associated with the relationship between the spouses, or
- (c) if the spouses did not have a common habitual residence, the internal law of the jurisdiction in which the spouse making an application for an order under this Part was most recently habitually resident.

Choice of law rules

108 (1) In this section, "regime of community of property" means a system of law, including a regime of partnership of acquests, in which property owned or acquired and debt owing or acquired during the relationship between the spouses

- (a) are deemed to be owned or owing by both spouses, and
- (b) are divided, on separation of the spouses, as if both spouses equally owned the property or owed the debt,

but does not include a regime of separate property or a system of law under which a spouse's interest is deferred until or after the occurrence of an event that signifies the end of the relationship between the spouses.

- (2) If the Supreme Court takes jurisdiction under this Division, the Supreme Court must act in accordance with the rules set out in this section.

- (3) Subject to subsection (4), if spouses make an agreement respecting the division of property or debt, the substantive rights of the spouses in a proceeding under this Part are determined by the agreement.
 - (4) The enforcement of an agreement under subsection (3) is subject to any restriction that the proper law of the relationship places on the ability of spouses to determine the division of property or debt by agreement.
 - (5) Subject to subsection (3), if the spouses' first common habitual residence during the relationship between the spouses was in a jurisdiction in which a regime of community of property applies, property owned or acquired and debt owing or acquired during the relationship between the spouses that is property or debt to which the regime of community of property applies must be divided at the end of the relationship between the spouses according to that regime of community of property.
 - (6) If neither subsection (3) nor (5) applies, the substantive rights of spouses in a proceeding under this Part must be determined according to the proper law of the relationship.
- [44] Section 109 authorizes the court to make orders respecting extraprovincial property. It provides:

Extraprovincial property

109 (1) If the Supreme Court has authority under this Division to make an order respecting extraprovincial property, the Supreme Court may make an order respecting the ownership and division of the extraprovincial property.

- (2) For the purposes of dividing extraprovincial property, the Supreme Court, on application by a spouse, may make an order to do one or more of the following:
 - (a) instead of dividing the extraprovincial property,
 - (i) require property or family debt within British Columbia to be substituted for rights in the extraprovincial property, or
 - (ii) require a spouse who has legal title to the extraprovincial property to pay compensation to the other spouse;
 - (b) if the court is satisfied that it would be enforceable against a spouse in the jurisdiction in which the extraprovincial property is located,
 - (i) preserve the extraprovincial property,
 - (ii) provide for the possession of the extraprovincial property,
 - (iii) require a spouse who has legal title to the extraprovincial property to transfer all or part of the spouse's interest in the extraprovincial property to the other spouse, or
 - (iv) provide for any other matter in connection with the extraprovincial property;

- (c) if the court is satisfied that it would be enforceable in the jurisdiction in which the extraprovincial property is located, provide for non-monetary relief.

[45] Division 6 of Part 5 of the FLA has no counterpart in the former FRA. Jurisdictional issues in relation to division of family property under the FRA were decided on the basis of the CJPTA and/or the common law. In the Family Law Act Transition Guide, the Ministry of Justice explained that Division 6 of Part 5 of the FLA is intended to be used in cross-border family property division proceedings, rather than the CJPTA because the CJPTA is "inconsistent with family law principles", writing at page 3-149:

The B.C. CJPTA, which came into effect in 2006 and sets out the circumstances in which a British Columbia court has jurisdiction to hear a case, is inconsistent with family law principles and does not include most of the circumstances relevant to determining a "real and substantial connection" for establishing jurisdiction in family property cases. This Division is patterned after the CJPTA, thereby importing the necessary rules, while providing an approach tailored to family property division.

- [46] The preliminary question to be answered is whether s. 106 applies in this case. Ms. Cockerham submits that it does. She argues that orders respecting property division may be made in more than one jurisdiction: British Columbia and Ontario. Family property and family debt are found in both locations. If s. 106 is found to apply, she submits this court has jurisdiction to make orders under Part 5 as a result of either s. 106(2)(c) and (d). She says she was a "habitual resident in British Columbia at the time a proceeding was commenced" and/or "there is a real and substantial connection between British Columbia and the facts on which the proceeding under this Part is based."
- [47] If s. 106 is found to apply, Mr. Hanc submits that Ms. Cockerham has not established jurisdiction under ss. 106(2)(c) or (d). He says that her residency in British Columbia is of a temporary nature and there is no connection between the facts and British Columbia.
- [48] I conclude that s. 106 of the FLA does apply here. I am satisfied, for the purposes of this application, that the parties did live together in a marriage-like relationship for at least two years. Although it is clear that nearly all of the property that could be subject to division is in Ontario, Ms. Cockerham's RRSPs (now cashed) and the sizeable engagement ring are in British Columbia. These could be subject to division as well. Orders respecting property division could be made in either jurisdiction.
- [49] Having concluded s. 106 applies, the next issue to determine is whether Ms. Cockerham has met either condition in s. 106(2)(c) or (d), giving this court authority to make orders under Part 5.

- [50] Section 106(2)(c) represents a significant extension of territorial competence pursuant to the CJPTA, which required the defendant to be ordinarily resident in British Columbia at the time of the commencement of a proceeding. Section 106(2)(c) of the FLA confers jurisdiction if either spouse is habitually resident in British Columbia at the time a proceeding under Part 5 is started.
- [51] What is meant by habitual residence? "Habitual" and "ordinary" residence are two expressions that have been used interchangeably: *S.R.L. v. K.J.T.*, 2014 BCSC 597 at para. 25 and *Mark v. Mark*, [2005] U.K.H.L. 42 at para. 33.
- [52] In *S.R.L.*, Madam Justice Fenlon summarized the principles governing the determination of ordinary residence at para. 30 as follows:
- [30] I now turn to the principles governing the determination of ordinary residence.
- a) Preponderance of time spent at a residence is not determinative: *Thomson v. Minister of National Revenue*, [1946] S.C.R. 209 at 224;
 - b) A person may be ordinarily resident without being actually resident: *Hardy v. Hardy*, [1969] 2 O.R. 875 (H.C.J.) at 876;
 - c) It is where a person regularly, normally or customarily lives his or her customary mode of life as opposed to a special, occasional, or casual residence: *Thomson* at 224, 231, *Hardy* at 876-877;
 - d) It is where a person intends to make a home for an indefinite period; an intention to reside there permanently is not required: *MacPherson v. MacPherson* (1976), 70 D.L.R. (3d) 564 (Ont. C.A.) at 570; *Mahar v. Mahar* (1987), 10 R.F.L. (3d) 276, [1987] B.C.J. No. 925 (N.B.Q.B.).
- [53] On the basis of these authorities, I am satisfied that at the time of filing her claim, Ms. Cockerham was habitually resident in British Columbia.
- [54] In March of 2014, Ms. Cockerham left the home she had previously shared with Mr. Hanc in Ontario. With nowhere to go, she moved to Kamloops, British Columbia and into the home of her mother and step-father, residents of Kamloops for several years. Having spent time here in the past with family and friends, it was a place familiar to her, a place where she now receives financial and emotional support.
- [55] Ms. Cockerham's evidence is clear that she is not a visitor or tourist here - this is her home. Her activities following her arrival here all support the conclusion that British Columbia is where she now normally and customarily resides. She obtained a British Columbia driver's licence. She secured a family doctor, who is currently treating her for a medical condition. She has applied for a multitude of jobs in Kamloops in fields related to her degree. She has significant and meaningful family ties here. That Ms. Cockerham may be accepted to a residency program next year that may see her away from Kamloops temporarily does not affect a finding that she was, and remains, habitually resident in British Columbia pursuant to s. 106(2)(c) of the FLA.

[56] Accordingly, I conclude that this court does have jurisdiction over Ms. Cockerham's claim under Part 5 of the FLA on the basis of her habitual residency at the time she started this proceeding. As will be expanded upon later in these reasons, I would not find jurisdiction based upon s. 106(2)(d) in this case.

[57] That does not end the matter. The significant question now becomes whether this court ought to decline jurisdiction in favour of Ontario pursuant to s. 106(4) of the FLA.

[58] The court is given discretion to decline jurisdiction by virtue of s. 106(4) which provides:

(4) Despite subsection (2), a court may decline to make an order under this Part if the court, having regard to the interests of the spouses and the ends of justice, considers that it is more appropriate for jurisdiction to be exercised outside British Columbia.

[59] Section 106(5) of the FLA sets out the factors that a court must consider when determining whether to decline jurisdiction under subsection (4). They are as follows:

(5) In determining whether to decline jurisdiction under subsection (4), the court must consider all of the following:

- (a) [Repealed. 2014-9-15(b)].
- (b) the relative convenience and expense for the spouses and their witnesses;
- (c) if section 108 [choice of law rules] applies, the law to be applied to issues in the proceeding;
- (d) the desirability of avoiding multiple proceedings or conflicting decisions in different courts or tribunals;
- (e) the extent to which an order respecting property or debt
 - (i) made in another jurisdiction would be enforceable in British Columbia, and
 - (ii) made in British Columbia would be enforceable in another jurisdiction;
- (f) the fair and efficient working of the Canadian legal system as a whole;
- (g) any other circumstances the court considers relevant.

[60] Consideration of these factors in the context of this case leads overwhelmingly to the conclusion that this court should decline jurisdiction in favour of Ontario.

[61] Other than the engagement ring that Ms. Cockerham kept and a small RRSP that she has now cashed and spent, the property and debts at issue are all located and based in Ontario. Mr. Hanc's real and other property is all located in Ontario. Ms. Cockerham's claims, as they have been pled, relate substantially to that real property, but also include claims to Mr. Hanc's RRSPs, pensions, chattels, insurance, savings, business interests, options, shares, and club memberships. Neither party owns any real property in British Columbia.

- [62] If this matter were to proceed in British Columbia, the inconvenience and expense to the parties would be very high, particularly to Mr. Hanc. The parties lived their lives together in Ontario. Civilian witnesses that may be required would largely be from Ontario. Mr. Hanc's financial information is all in Ontario. Expert witnesses from Ontario would be required in relation to appraisals of the real property and possibly his other assets. The significant family debt that is claimed is based upon a contract signed by the parties in Ontario. Bank representatives involved in the contract and/or in keeping of the records may be required to testify. To hear this matter, with nearly all Ontario witnesses, would be very inconvenient and expensive to many people, significantly Mr. Hanc.
- [63] Further, s. 108 of the FLA applies to this case and leads to the inevitable conclusion that the applicable internal law that would apply to Ms. Cockerham's claims under Part 5 of the FLA is the law of Ontario.
- [64] Section 108(2) mandates that if the court takes jurisdiction under Division 6 of Part 5, it must act in accordance with s. 108. As there is no agreement between the parties regarding the applicable internal law, only subsections (5) and (6) are relevant. Those subsections provide:
- (5) Subject to subsection (3), if the spouses' first common habitual residence during the relationship between the spouses was in a jurisdiction in which a regime of community of property applies, property owned or acquired and debt owing or acquired during the relationship between the spouses that is property or debt to which the regime of community of property applies must be divided at the end of the relationship between the spouses according to that regime of community of property.
- (6) If neither subsection (3) nor (5) applies, the substantive rights of spouses in a proceeding under this Part must be determined according to the proper law of the relationship.
- [65] The parties' first common habitual residence was in Ontario. It was their only residence together where they lived and participated in everyday family life. If Ontario has a "regime of community property", the applicable internal law is that of Ontario. If Ontario does not have a "regime of community property", the applicable internal law is determined by s. 107 of the FLA. Also known as the "proper law" of the spousal relationship, this too would be Ontario law because Ontario is the jurisdiction where the parties had their most recent common habitual residence.
- [66] As I have concluded the law of Ontario would apply to Ms. Cockerham's claims under Part 5, additional inconvenience and expense would be required if this matter proceeded in British Columbia. As Mr. Hanc points out, an expert in Ontario family law would be required to offer opinion evidence on the law of property and debt division.
- [67] Having regard to the interests of both parties, consideration of the factors in s. 106(5) and all of the circumstances of this case, it is my view that the ends of justice can only be met if jurisdiction is exercised outside of British Columbia, in Ontario.

(ii) CJPTA

[68] If I am wrong and s. 106 of the FLA does not apply in this case, jurisdiction would be determined by the provisions of the CJPTA. If that is the case, my conclusion would, practically speaking, be the same. I conclude that Ms. Cockerham has failed to satisfy the test for territorial competence articulated in s. 3(e) of the CJPTA.

[69] Section 3 of the CJPTA provides that a court has territorial competence in a proceeding against a person in certain circumstances. The only potentially applicable circumstance here is found in subsection (e), whether there is a "real and substantial connection between British Columbia and the facts on which the proceeding against that person is based."

[70] Section 10 of the CJPTA enacts the presumption that a real and substantial connection exists in certain specified circumstances. None of those listed circumstances exist in this case. However, s. 10 expressly provides that the listed presumptive circumstances do not limit the right of the claimant to prove other circumstances that would constitute a real and substantial connection between British Columbia and the facts upon which the proceeding is based.

[71] Ms. Cockerham relies upon the following circumstances in support of her position that this court should find a real and substantial connection between British Columbia and the facts in this case:

1. Her physical presence in and close family ties to British Columbia;
2. The location of two of the potential family properties the engagement ring and her RRSPs (now cashed), in British Columbia;
3. Potential witnesses (her family members) located in British Columbia;
4. Her servicing of the potential family debt, the Royal Credit Line Agreement for Students, in British Columbia; and
5. Her financial inability to conduct this litigation elsewhere.

[72] Family law cases should not be governed by special or more relaxed rules to establish jurisdiction under the CJPTA: *Aleong* at para. 140.

[73] Section 10 of the CJPTA does not allow a party the wide-ranging ability to establish other grounds that constitute a reasonable and substantial connection. The scope of additional presumptive connecting circumstances is narrow and limited to those similar to the circumstances enumerated in s. 10. Generally, all presumptive connecting factors point to a relationship between the subject matter of the action and British Columbia such that it would be reasonable to expect a defendant would be called upon to answer legal proceedings in British Columbia: *Aleong* at paras. 107-109, 112, 129-130.

[74] In *Aleong*, Madam Justice Adair rejected a number of circumstances as presumptive connecting factors following her thorough analysis of the law in this area. Mr. Hanc summarized it well at paragraph 21 of his notice of application when he wrote:

21. The Court in *Aleong* rejected the following as presumptive connecting factors:
- a. The Claimant's presence in British Columbia;
 - b. The fact that the parties had resided in British Columbia for the majority of their 41 year marriage;
 - c. The parties' assets were developed in British Columbia;
 - d. The physical presence of the parties' children and grandchildren in British Columbia; and
 - e. The emotional ties between parents, their children and grandchildren.

***Aleong*, supra at paras 116-117, 130, 133, 134, 140**

[75] British Columbia is a forum to which the only connection is Ms. Cockerham's presence, which carries with it her possession of the engagement ring and funds from her RRSPs, now spent.

[76] Ms. Cockerham moved to British Columbia after the relationship ended. The entirety of the parties' relationship occurred in Ontario, where they both lived, worked, accumulated assets, and incurred debt. Most, if not all, of the material facts upon which Ms. Cockerham's claim is based occurred in Ontario. With the small exceptions noted, all of the potential family property and family debt originated and is located in Ontario. Mr. Hanc has no connection to British Columbia whatsoever.

[77] I conclude the factors upon which Ms. Cockerham relies to establish "other circumstances" constituting a real and substantial connection do not sufficiently point to a relationship between the subject matter of the litigation and British Columbia such that it would be reasonable to expect Mr. Hanc to be called upon to answer legal proceedings here.

(b) Claim for Spousal Support

[78] Ms. Cockerham's claim for spousal support is brought pursuant to Part 7 of the FLA. Unlike Part 5, this Part of the FLA does not contain any provisions conferring or denying jurisdiction. Accordingly, the provisions of the CJPTA and the ISOA apply to this claim.

[79] Mr. Hanc submits that this court has no jurisdiction with respect to this claim either. He stresses that he is not, and has never been, a resident of British Columbia. He has no connection to British Columbia. As a non-resident, he submits that Ms. Cockerham's claim for spousal support must be made pursuant to the provisions of the ISOA; the FLA does not empower a B.C. court to make an original order for support against a non-resident.

- [80] Ms. Cockerham submits that the FLA has changed the legal landscape in this area as well, particularly for common-law couples. Unlike the Divorce Act, which specifically confers jurisdiction on the court after a one year period of ordinary residency, the FLA is silent on the issue. Given the absence of statutory language and the absence of case authorities considering the interplay between the ISOA, the CJPTA, and the FLA in this area, she again urges the court to focus on general principles and "embrace" jurisdiction over this issue. To not embrace jurisdiction here would force Ms. Cockerham, she argues, to utilize the mechanisms in the ISOA, which she says are slow, cumbersome, and have the effect of defeating the purpose and object of the Family Rules.
- [81] The ISOA sets out a method by which a resident of British Columbia can seek support against a non-resident person. Enacted in 2003, it repealed and replaced a reciprocal enforcement scheme found in the FRA, known as "REMO": *Herriman v. Beresford*, 2012 BCCA 437 at para. 9.
- [82] The ISOA creates "a complete code for the recognition, enforcement, and variation of support orders between British Columbia and the reciprocating jurisdictions": *Herriman* at para. 9. "All of the Canadian provinces and territories are declared to be reciprocating jurisdictions": *Herriman* at para. 10.
- [83] Ontario has equivalent ISOA legislation: the Interjurisdictional Support Orders Act, S.O. 2002, c. 13.
- [84] Practically speaking, under the ISOA, a British Columbia claimant fills out and sends the required forms to support his or her claim to the designated authority here. The designated authority then reviews the materials for completeness and sends them to the designated authority in the jurisdiction in which the respondent resides. No court appearance in British Columbia is required. The designated authority in the receiving jurisdiction will then forward the support application to its court, which will send the respondent a notice of hearing, giving the respondent an opportunity to respond in that forum. The respondent's forum will then determine entitlement and, if necessary, the quantum of support, under its law.
- [85] If a support order is made in the respondent's forum, it will be sent to the designated authority in British Columbia for registration in our court in accordance with the provisions in Part 3.
- [86] In *Mathers v. Bruce*, 2005 BCCA 410, Smith J.A. outlined the background, procedures, and effects of the ISOA at paras. 4-7 as follows:
- [4] The ISO Act is based on model uniform legislation which was developed by a standing committee of officials from the federal, provincial, and territorial governments for the purpose of facilitating the interjurisdictional recognition, variation, and enforcement of support orders made in family proceedings. It repealed and replaced Part 8 of the Family Relations Act, which was entitled "Reciprocal Enforcement of Maintenance Orders".

- [5] An important procedural change enacted by the ISO Act eliminates the need for two hearings in situations where the reciprocating jurisdictions have both adopted the ISO scheme. Under the old scheme involving the reciprocal enforcement of maintenance orders, a party was required to obtain a provisional order in his or her jurisdiction which would not be effective until it was confirmed at a second hearing in the reciprocating jurisdiction in which the other party resided. Under the ISO scheme, an order made in one jurisdiction is given full faith and credit in the reciprocating jurisdiction and is enforceable immediately upon registration there without the necessity of a confirmation hearing.
- [6] Another notable feature of the ISO scheme is the attempt to simplify the procedures and make them more readily accessible to lay persons. To that end, there has been a movement to prepare standard forms for use in the Canadian jurisdictions. As well, at least in British Columbia, the forms have been made available on the worldwide web, along with explanatory guides and procedural advice.
- [7] While it has eliminated much complexity and delay in the procedures, the ISO Act has not fundamentally changed the machinery of the system as it operates between reciprocating jurisdictions. As before, the exchange of relevant documents takes place between government officials.
- [87] No court has discussed the interplay between the ISOA and the FLA, but the interplay between the ISOA and its predecessor, the FRA, was considered by the British Columbia Court of Appeal in *Virani v. Virani*, 2006 BCCA 63 [Virani 1] and *Virani v. Virani*, 2006 BCCA 341 [Virani 2]. Like the FLA, the FRA was silent with respect to any residency or other requirements necessary to confer jurisdiction on the court.
- [88] One of the issues squarely before the Court of Appeal in *Virani 1* was whether the FRA empowered a British Columbia court to make an original order for support against a non-resident. Madam Justice Southin concluded that it did not, writing at paras. 62-65 as follows:
- [62] I turn then to the second question, the Family Relations Act. In my opinion, the answer to this question is "no", for the simple reason that by enacting the Interjurisdictional Support Orders Act, the Legislature intended to make a code and did so for a very good reason; that is, to enact legislation which is complementary to legislation existing in jurisdictions with which we have reciprocal arrangements.
- [63] The petitioner below is a "claimant in British Columbia". Division 1 of the statute provides in full the means by which such a claimant may obtain an order in this jurisdiction requiring support.
- [64] There is nothing before us to indicate whether California is a "reciprocating jurisdiction that requires a provisional order".

Conclusion on the Divorce Act and the Family Relations Act

- [65] It follows from all this that, in my opinion, neither statute was a sound foundation for the order made in this case.
- [89] Further, in *Virani 2*, Southin J.A. went on to explain at paras. 8-9:
- [8] The Act has a precise mechanism by which a person resident in this jurisdiction may obtain a support order against a person not resident in this jurisdiction. The mechanism engages public officers in both jurisdictions.
- [9] The courts of this Province should not entertain any proceedings which might fairly be considered to be wiggling out of the requirements of the scheme, at least in those cases in which one of the parties is a foreigner whose only tie to Canada, the habitual residence of his child, was imposed upon him by his former wife, the custodial parent.
- [90] A situation similar to the one at bar arose in *Green v. Green*, 2009 BCSC 900. In that case, the parties lived in Ontario while together. Mrs. Green moved to British Columbia following their separation. Four months later, she commenced an action in British Columbia seeking spousal support. Mr. Green was served properly in Ontario and, shortly thereafter, sent a letter to the court registry in British Columbia stating his objection to the court's jurisdiction to hear the matter. For reasons that are not clear, an interim order for spousal support was made. Mr. Green did not attorn to this jurisdiction.
- [91] Mr. Green applied to set aside or cancel this order. Madam Justice Koenigsberg held that the order was a nullity, finding the British Columbia Court had no jurisdiction to make the order. In so finding, she held at para. 12:
- [12] At the time, the appropriate means by which the plaintiff could have sought the support which she may have been entitled to, would have been through the Interjurisdictional Support Orders Act. She did not avail herself of that procedure and, instead, sought the means that she did.
- [92] Neither the Family Rules nor the FLA alters the ISOA scheme or renders it now inapplicable. Express statutory language would be required for such a result. No such language exists. Although Ms. Cockerham argues that the ISOA mechanisms are inconsistent with the object of the Family Rules, describing them as slow and cumbersome, one can also see how its scheme is consistent with the object as well. A process whereby no court appearance in British Columbia or another jurisdiction is required in order to obtain a support order could be seen as promoting a just and inexpensive determination of the issue.
- [93] In any event, in the absence of express statutory language rendering the ISOA inapplicable in light of the FLA, *Virani 1* and *Virani 2* remain binding authority on this court. Mr. Hanc is not a resident of British Columbia, nor has he ever been. He has no connections to British Columbia whatsoever. In these circumstances, this court has no jurisdiction to make an original order for support against him pursuant to the FLA. I have already concluded the requirements or s. 3(e) of the CJPTA are not established in this case. Ms. Cockerham has the mechanisms of the ISOA available to her should she so chose.

VI SUMMARY AND COSTS

- [94] To summarize, I conclude this court has jurisdiction in respect of Ms. Cockerham's claims under Part 5 of the FLA, but I decline to exercise that jurisdiction pursuant to s. 106(4) of the FLA in favour of Ontario. If I am wrong and s. 106 of the FLA does not apply, I conclude this court lacks territorial competence pursuant to the provisions of the CJPTA. Finally, I conclude this court does not have jurisdiction under either the FLA or the provisions of the CJPTA in respect of Ms. Cockerham's claim for spousal support.
- [95] Mr. Hanc's application pursuant to Rule 18-2 of the Family Rules is granted. This family law case is dismissed. It follows that Ms. Cockerham's application for interim spousal support is also dismissed.
- [96] The parties will bear their own costs of these applications. There is no basis for Mr. Hanc's application for special costs. Ms. Cockerham's conduct in commencing this action and pursuing her application in British Columbia falls far short of "reprehensible", nor was she "forum shopping". Given the significant changes introduced in the FLA, these jurisdictional issues are complex and novel. In the circumstances, I exercise my discretion to award no costs.

"S.A. Donegan J."

DONEGAN J.

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