
CANADA / JUDGMENT

Monteiro v. Monteiro

2015 BCSC 1543

COURT

Supreme Court of British Columbia

DECIDED

22 July 2015

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2015 BCSC 1543 Monteiro v. Monteiro

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Monteiro v. Monteiro,

2015 BCSC 1543

Date: 20150722

Docket: E150918

Registry: Vancouver

Between:

Jody Dawn Locke Monteiro

Claimant

And

Roy (Rui) Manuel Dos Santos Monteiro

also known as Roy Monteiro

Respondent

Before: The Honourable Madam Justice Burke

Oral Reasons for Judgment

Counsel for the Claimant:

G. Gill

Counsel for the Respondent:

G. Lang

Place and Date of Hearing:

Vancouver, B.C.

July 16, 2015

Place and Date of Judgment:

Vancouver, B.C.

July 22, 2015

introduction

- [1] These are my oral reasons for judgment. I reserve the right to edit these reasons but the substance will not change.
- [2] The respondent, Mr. Monteiro, seeks an order that this family proceeding, originally filed April 8, 2015 by Mrs. Monteiro and amended July 7, 2015, seeking division of property, be struck or stayed, on the basis this Court lacks jurisdiction, or that this Court should decline to exercise its jurisdiction pursuant to Rule 18-2 of the Supreme Court Family Rules.
- [3] Mr. Monteiro maintains all family issues between the parties are presently before the court in Portugal.

background

- [4] The background in this case is somewhat complex. Rather than set it out in detail, I will provide a brief perspective of the matter.
- [5] The family presently lives in Portugal. Mr. and Mrs. Monteiro were married in Vancouver, British Columbia, on January 14, 2006. They separated on February 7, 2014. The parties had signed a prenuptial agreement on January 6, 2006.
- [6] The parties have a daughter, Lauren, born in July 2006. The family resided in Vancouver until August 2011. At that time, the family left and took up residence in Vilamoura, Portugal, where they have lived since.
- [7] Between July 2014 and March 2015, a series of custodial events concerning the daughter took place. Essentially, Mrs. Monteiro took her daughter from the family home in Portugal and drove to Seville, Spain, allegedly in contravention of a Portuguese travel restriction that prevented her from leaving Portugal with her daughter. She and her daughter flew to St. John's, Newfoundland, where it appears Mrs. Monteiro has some family.

- [8] As a result, a number of applications were filed and dealt with by the Newfoundland courts concerning the custody of the daughter. Ultimately, on September 4, 2014, the Newfoundland Provincial Court, after considering an application pursuant to the Hague Convention on Child Abduction, ordered the daughter's return to Portugal, after concluding her habitual residence was Portugal.
- [9] The Court's reasons note while the residence in Vancouver was the principal residence of the parties from 2005 to 2011, that changed when the parties moved to Portugal and enrolled Lauren in school there in 2011. The parties are now habitually resident in Portugal. The Court noted the property in Vancouver is simply a place to stay when the parties are in Vancouver, as is a summer home located in Newfoundland.
- [10] Following these court proceedings, Mr. Monteiro and his daughter returned to Portugal on September 5, 2014. On September 16, 2014, Mrs. Monteiro returned to Portugal.
- [11] Meanwhile, on August 11, 2014, Mr. Monteiro had initiated proceedings in Portugal with respect to the exercise of parental responsibilities over the parties' daughter. Mrs. Monteiro responded by seeking an order for full guardianship and that she and her daughter be permitted to permanently move to Vancouver. While Mr. Monteiro had initially sought shared guardianship, he amended this to seek full guardianship.
- [12] On November 7, 2014, Mr. Monteiro initiated divorce proceedings against Mrs. Monteiro in the Portugal court.
- [13] From February 2015 until June 2015, a number of further court orders were made in Portugal with respect to the guardianship of the parties' daughter, and parental responsibilities. The parties advise the issue appears to have been resolved at present, while the equivalent of an s. 211 report is prepared, and the parties remain in Portugal.
- [14] On April 22, 2015, Mrs. Monteiro brought an application in the Portugal divorce action for spousal support. She also seeks enforcement of the parties' prenuptial agreement in the Portuguese proceedings. In doing so, Mrs. Monteiro asked that B.C. law be applied to the Portuguese action, in accordance with the prenuptial agreement. That agreement deals with all property issues between the parties.
- [15] As noted earlier, on April 8, 2015, Mrs. Monteiro filed a notice of family claim under the Family Law Act, S.B.C. 2011, c. 25 [FLA], seeking an order for spousal support, an order relating to family property and debt, and an order for costs. Mrs. Monteiro amended that claim on July 3, 2015 to limit her claim for property only. Mrs. Monteiro withdrew her claim for spousal support in B.C.
- [16] Mrs. Monteiro has also filed a Certificate of Pending Litigation ("CPL") against the title to the Vancouver residence, as the property is registered solely in Mr. Monteiro's name. She wishes to pursue her claim under the FLA for division of a family property located in Vancouver.

issue

- [17] The issue in this case is whether this Court should decline jurisdiction under s. 106 of the FLA, in favour of proceedings that have been commenced in Portugal?

CONCLUSION

- [18] I conclude while this Court has jurisdiction to deal with this action, in light of the fully encompassing proceedings in Portugal, this Court should refrain from exercising that jurisdiction. Accordingly, these proceedings are stayed pursuant to Rule 18-2 of the Supreme Court Family Rules on this basis. My reasons for this conclusion are as follows.

analysis

- [19] The burden of proof in establishing territorial competence or jurisdiction of the court rests with the party seeking to establish its existence. In this case, that is Mrs. Monteiro: *Aleong v. Aleong*, 2013 BCSC 1428.
- [20] The property at issue in this case is located in B.C.. Under s. 106(2) of the FLA, the court has authority to make an order regarding property division on the basis there is a "real and substantial connection" between B.C. in the facts. As per s. 106 (3), a "real and substantial connection" is presumed to exist where the property which is the subject of the proceedings is located in B.C. This Court accordingly has the jurisdiction to consider this claim as per *Cockerham v. Hanc*, 2014 BCSC 2432.
- [21] The question then becomes whether this Court ought to decline jurisdiction under s. 106(4) of the FLA. Section 106(5) sets out the factors the court must consider in deciding this matter:
- (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.

- [22] Mrs. Monteiro argues this Court should retain jurisdiction and determine the claim for property. She maintains this action has been commenced in B.C., as this property is the major asset of the parties, worth approximately \$800,000. There is a small property in Newfoundland worth considerably less.
- [23] Through this action, Mrs. Monteiro seeks to secure an interest in the disputed property through a CPL. The property at present is registered in the name of Mr. Monteiro only. Mrs. Monteiro is uncertain as to what other assets of Mr. Monteiro are in Portugal, and cannot be sure she will be able to obtain her share of those interests. If she is unable to register a CPL on the property in Vancouver, Mrs. Monteiro is concerned the property could be sold or otherwise dealt with without any protection, which will affect her ability to be compensated for her interest in this property.
- [24] Mrs. Monteiro points out there is no other effective way of securing her interest in the property, as it does not comply with the requirements of the Land (Spouse Protection) Act, R.S.B.C. 1996, c. 246. That Act requires the premises to have been occupied within the period of one year immediately preceding the date of the making an application under the Act. In this case, the premises at issue have not been occupied for the one year immediately preceding the date of any application under that provision.
- [25] Mrs. Monteiro argues the court must consider the factors as delineated in s. 106(5) of the FLA and conclude this Court should retain jurisdiction in this matter. She argues there is a real and substantial connection, as evidenced by the property located in British Columbia, and expense and inconvenience, if the matter is heard in Portugal. A B.C. law expert will be required to travel to Portugal. Mrs. Monteiro also relies on the fact the issue of property alone can be determined as per comments in *S.R.L. v. K.J.T.*, 2014 BCSC 597.
- [26] It is common ground the prenuptial agreement divides the parties' property between them. The parties also agree the proper law for the contract is B.C. law, which Mrs. Monteiro pled in the Portugal proceedings.
- [27] In considering the factors under s. 106(5) of the FLA, I have concluded the Court in this case should decline to exercise jurisdiction. The parties' habitual residence is Portugal and has been so since 2011. Mr. Monteiro has filed divorce and custody proceedings in Portugal. As part of these proceedings, Mrs. Monteiro seeks spousal support and specifically pleads the parties' prenuptial agreement, which deals with the property issues between the parties. B.C. law is pled as part of these proceedings and there is no issue that it will apply.
- [28] Further, Mrs. Monteiro has obtained a court order in Portugal restraining 50% of the funds in Mr. Monteiro's bank accounts and requested proceedings to identify family assets. Property division is therefore clearly under litigation in Portugal. In addition, ongoing settlement discussions, as part of these proceedings, are underway in Portugal. Numerous applications concerning custody and the parenting of the parties' daughter have been dealt with in Portugal. These proceedings are all presently underway in Portugal.

- [29] Section 106(5) of the FLA notes the desirability of avoiding multiple proceedings and/or conflicting decisions by different courts. The need and expense of a B.C. law expert travelling to Portugal does not override these concerns. Mrs. Monteiro's application appears singular and unnecessarily isolated from the actions underway in Portugal, thereby demonstrating the need for the issues to be decided in one forum.
- [30] This is unlike the unusual situation in S.R.L. where the judge concluded it was appropriate to split the parties' issues. Those facts were somewhat unique and very different from those presented in this case. Indeed, Madam Justice Fenlon said in S.R.L., it is preferable to determine all issues in one jurisdiction. As noted in that case, division of property could affect spousal support. These issues are both being dealt with in the Portuguese proceedings. This is therefore not a case where it would be appropriate for two forums to engage separately in these efforts.
- [31] While I appreciate Mrs. Monteiro's concern with respect to property in British Columbia, pursuant to s. 10(k) of the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28, a Portuguese court order is enforceable in B.C..
- [32] In view of all these factors, the interests of the parties, and all the circumstances, I conclude the ends of justice can only be met if jurisdiction is exercised outside B.C.; in Portugal, where the proceedings are underway.
- [33] I therefore decline to exercise jurisdiction in this matter, as per s. 106(4) of the FLA. Mr. Monteiro's application to stay the proceedings is granted pursuant to Rule 18-2 of the Rules.
- [34] Given the potential complexity of these proceedings, I also make no order as to costs.

"Burke J."

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