
CANADA / JUDGMENT

N.M.F. v. H.B.F.

2021 BCSC 221

COURT

Supreme Court of British Columbia

DECIDED

8 February 2021

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

N.M.F. v. H.B.F.,

2021 BCSC 221

Date: 20210208

Docket: E200111

Registry: Vancouver

Between:

N.M.F. also known as N.M.F.

Claimant

And

H.B.F. also known as Dr. H.F.

Respondent

Corrected Judgment: The cover page of this judgment was corrected on March 19, 2021.

Before: The Honourable Mr. Justice Edelmann

Oral Reasons for Judgment

Counsel for the Claimant, via teleconference:

P. Daykin

Counsel for the Respondent, via teleconference:

A. Laing

Place and Date of Hearing:

Vancouver, B.C.

February 3, 2021

Place and Date of Judgment:

Vancouver, B.C.

February 8, 2021

Introduction

- [1] This is an application by the Respondent for this Court to decline to exercise jurisdiction over him and stay this action under Rule 18-2(2) of the Supreme Court Family Rules, B.C. Reg. 169/2009. The Notice of Application sought the dismissal of the claim, but the Respondent did not pursue that aspect of the application. I will begin by briefly outlining the context of the relationship before addressing the legal question before me.

Relationship between the parties

- [2] The parties met in Illinois, U.S.A. in May 1996. When they met, the claimant was a citizen of Croatia living in the United States on an expired temporary visa. The respondent was a citizen of Sweden who was working as a research scientist with the U.S. government. The respondent also had Canadian citizenship through his mother.
- [3] The parties were married on August 20, 1996, in Illinois where they remained until 1999 when they moved to Sweden. The parties have four children. The eldest was born in 1997 in the United States.
- [4] In 2009, the parties and their three eldest children moved to Vancouver. The respondent completed a medical residency at the University of British Columbia and obtained a medical licence in British Columbia. The parties' youngest child was born in British Columbia in 2010.
- [5] Between 2015 and 2017, the two eldest children moved to Sweden to continue their education. All education in Sweden is free, and each person pursuing post-secondary studies is entitled to monthly support from the Swedish government.
- [6] In October 2017, the claimant moved to Sweden with the remaining children. The eldest child has since graduated from her post-secondary studies. It would appear that the three younger children remain children of the marriage.

- [7] The claimant and the children currently live in Sweden in a residence for which the parties jointly hold a lifetime lease. On the weekends, they reside on a property outside Stockholm that the Respondent's mother gifted to the children.
- [8] The Respondent currently lives in Vancouver, British Columbia with his new partner and their infant daughter. The Respondent travels to Sweden to see the children every couple of months and vacations with them a couple of times a year.

Jurisdiction of the court

- [9] The jurisdiction of the court in relation to spousal and child support is assessed under the general principles in s.3 of the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 [CJPTA].

3 A court has territorial competence in a proceeding that is brought against a person only if []

- (d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding, or
- (e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

- [10] Sections 105 to 109 of the Family Law Act, S.B.C. 2001, c. 25 [FLA] set out the applicable jurisdiction and choice of law rules in relation to property division. Section 106 addresses the existence of jurisdiction:

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: []

- (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.

- [11] Although the Notice of Application sought a declaration that this Court does not have jurisdiction, the Respondent now concedes that the court has jurisdiction, as he is habitually resident in British Columbia. I note that in addition to the Respondent's habitual residence in British Columbia, I would have been prepared to find that this Court has jurisdiction as there is a real and substantial connection between the facts at issue and this province as set out in s.106(3)(a) and (b) of the FLA and s.10(a) of the CJPTA.

Exercise of Jurisdiction

- [12] The core of the issue to be decided is whether this Court should decline to exercise jurisdiction over the Respondent. The Court of Appeal discussed the question of exercise of jurisdiction under the FLA in *Jiang v. Shi*, 2017 BCCA 276:
- [27] The structure of s. 106 is consistent with the common law distinction between assuming and exercising jurisdiction. The importance of separating the consideration of each question has been emphasized in one of the leading common law decisions on jurisdictional questions, *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572 [Van Breda]:
- [101] a clear distinction must be drawn between the existence and the exercise of jurisdiction. This distinction is central both to the resolution of issues related to jurisdiction over the claim and to the proper application of the doctrine of *forum non conveniens*. *Forum non conveniens* comes into play when jurisdiction is established. It has no relevance to the jurisdictional analysis itself.
- [102] Once jurisdiction is established, if the defendant does not raise further objections, the litigation proceeds before the court of the forum. The court cannot decline to exercise its jurisdiction unless the defendant invokes *forum non conveniens*. The decision to raise this doctrine rests with the parties, not with the court seized of the claim.
- [103] If a defendant raises an issue of *forum non conveniens*, the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. The defendant must identify another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action. The defendant must show, using the same analytical approach the court followed to establish the existence of a real and substantial connection with the local forum, what connections this alternative forum has with the subject matter of the litigation. Finally, the party asking for a stay on the basis of *forum non conveniens* must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate.
- [13] In *Breeden v. Black*, 2012 SCC 19, the Supreme Court of Canada further commented on the burden on a party raising *forum non conveniens*:

[37] [...] The forum non conveniens analysis does not require that all the factors point to a single forum or involve a simple numerical tallying up of the relevant factors. However, it does require that one forum ultimately emerge as clearly more appropriate. The party raising forum non conveniens has the burden of showing that his or her forum is clearly more appropriate.

[Emphasis in original]

[14] The factors to be considered by the court in relation to the child and spousal support issues are set out at s.11 of the CJPTA, while they are set out starting at s.106(4) of the FLA:

(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)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.

[15] As pointed out by Maisonville J. in *Fastlicht v. Carmichael*, 2018 BCSC 37 at para. 99, the factors to be considered in exercising the discretion to decline jurisdiction in s.106 of the FLA and s.11 of the CJPTA are essentially identical. To the extent there are any distinctions to be made, neither party argued they would be relevant in the case before me. I will therefore address each of the factors in turn in relation to all three issues.

Relative convenience to the parties and their witnesses

- [16] This is an unusual case insofar as the spouse who is ordinarily resident in British Columbia seeks to have the matter heard in Sweden and the party who resides in Sweden seeks to have the matter heard in British Columbia. The Respondent says that it is more convenient to have the matter heard in Sweden because he regularly travels there to visit his children in any event, and it would be more inconvenient for the Claimant to travel to British Columbia. I give little if any weight to the alleged inconvenience to the opposing party who has chosen this jurisdiction, as she has presumably considered such inconvenience in making her choice. To the extent the Claimant's foreign residence would inconvenience the Respondent in proceedings before this Court, I would note that the Claimant's decision to litigate in British Columbia would presumably be a relevant factor for this Court to consider should she seek accommodations given her residence in Sweden. In my view, the relative convenience to the spouses does not favour declining jurisdiction.
- [17] In relation to the other witnesses in this matter, it is unclear at this stage which other witnesses will be required in relation to the various aspects of the claim. There are a number of assets in various jurisdictions relevant to the proceedings at issue, including real property in Sweden and Croatia, bank accounts, stocks, artwork and jewellery. There are also five companies owned by the parties.
- [18] In 2000, the parties founded and became equal owners of a company in Sweden called Discover Health AB. The Respondent alleges that in or around 2018, the Claimant caused the shares he held in Discovery Health to be transferred to the Claimant and the elder children without the Respondent's knowledge or consent.
- [19] Around October 2009, the Claimant started a company that manufactured and distributed acupuncture mats and other related health products and incorporated Spoonk Space, Ltd. in Canada, which is wholly owned by the claimant. In 2010, the parties founded a U.S. corporation to carry out the same business in the U.S. and globally. The Canadian company would appear to have ceased substantive operations once the U.S. company was incorporated. The parties each own half of the U.S. company.
- [20] The Respondent incorporated a neuro-immunology lab as Neurocode Labs Inc. ("Neurocode") in British Columbia in 2015. The Respondent incorporated his medical corporation in British Columbia in 2016. The Claimant and the medical corporation both own shares of Neurocode, and the parties both own shares of the medical corporation.
- [21] The Respondent raises the possibility that the valuation of the items such as artwork, jewellery, bank accounts, and real estate would require testimony from experts in Sweden. Even assuming the need for viva voce evidence, it is difficult to understand why such evidence would require the testimony of experts in person rather than by video or some other means of telecommunication.

- [22] In my view, it is much more likely that the nature, ownership and valuation of the parties' corporate assets and resulting income streams might present the types of evidentiary challenges that may require viva voce testimony. On the face of the record before me, it appears clear that findings in relation to the medical corporation and Neurocode are likely to play a significant role in property division as well as child and spousal support. Therefore, although there is a corporation to be assessed in Sweden, in my view, the assessment of corporate assets in British Columbia is more likely to be central to the triable issues before the court.
- [23] I would be inclined to find that the relative convenience to witnesses favours proceedings in British Columbia, but even taking the Respondent's case at its strongest this would be at best a neutral factor.

The law to be applied to the issues in the proceedings

- [24] In relation to child and spousal support, s.12 of the FLA clearly establishes the law of British Columbia as the applicable law. It would only be in circumstances where there was no entitlement to support in British Columbia that the law of Sweden might apply given the residence of the Claimant and the children. The Respondent concedes that there is at the very least a prima facie case for both child and spousal support on the record before me. I am therefore satisfied for the purposes of the application before me that the law of British Columbia applies to the issues of child and spousal support.
- [25] With respect to the division of property, the FLA sets out a more detailed process for choice of law starting at s.108(2):
- 108 (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. []
- (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.
- [26] As neither party alleges an agreement respecting the division of property, s.108(3) is not applicable.

[27] Neither party has asserted the application of s.108(5) as the first common habitual residence during the relationship was in Illinois. In any event, there is no evidence before me that Illinois is a jurisdiction in which a regime of community of property as defined in s.108(1) applies.

[28] As neither subsection (3) nor (5) appears to be applicable, s.108(6) directs that substantive rights in relation to the division of property be determined according to the proper law of the relationship. The criteria for assessing of the "proper law of the relationship" referred to in s.108(6) is under s.107:

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.

[29] I am satisfied on the evidence before me that the parties had their most recent common habitual residence in Vancouver and that neither 107(b) nor (c) are applicable. I find that British Columbia is therefore the "proper law of the relationship" for the purposes of s.108(6) as it relates to the division of property.

[30] This factor favours the exercise of jurisdiction by this Court.

Multiplicity of Proceedings

[31] It will be helpful to begin the discussion of this factor by outlining the history and nature of the proceedings in both jurisdictions. I have limited information before me about the Swedish legal process, primarily in the form of affidavits from the parties' Swedish lawyers.

[32] On September 24, 2018, the Respondent commenced divorce proceedings in Sweden with the consent of the Claimant, and on May 10, 2019, the Stockholm District Court issued an order for divorce between the parties. Within the Swedish proceeding, the parties have reached an agreement regarding the parenting of the Children.

[33] On December 23, 2019, the Respondent filed a petition for the Stockholm District Court to appoint an arbitrator with respect to the division of property. The COVID-19 pandemic and the death of the arbitrator originally appointed have delayed the arbitration process. The Swedish court appointed a new arbitrator in November 2020, who has been in contact with the parties.

[34] The affidavit of Ms. Berg provides the most detailed information before me about the process in relation to property division in Sweden:

In Sweden, the divorce and the division of marital properties are two separate processes, and the division can be done within 10 years after the legal divorce. If the parties cannot agree on how to divide marital properties between themselves, one party has the right to ask the court to assign an arbitrator. [...]

It is enough that one of the parties petitions the court to assign an arbitrator. Even if the other party objects to arbitration, the court will still assign an arbitrator. Both parties can object to the specific person that the court has assigned; for example, if there is a conflict of interest. The arbitrator's first task is to see if the parties can agree on an amicable division. If that is not possible, the arbitrator can divide the assets by force, if one of the parties requires them to do so. [...]

If a Swedish arbitrator is asked to divide the parties' assets through force, they may divide assets in Sweden while also considering ownership and value of assets that are located abroad.

The Swedish arbitration process is a simplified process. There is for example no possibility to consider oral testimonies by witnesses.

With some exceptions, the parties' obligations are limited to presenting documents showing assets and debts that they had on the day that the divorce was filed. If the assets are complex and oral witnesses are needed to reach a fair outcome, the ruling by an arbitrator must be appealed to court for a more extensive trial. The parties can also put the arbitration process on hold and ask the court to decide on a specific question that relates to the division.

[35] Both Swedish lawyers whose affidavits are before me have indicated that it is not customary for spouses to pay spousal support to each other after a divorce in Sweden. The affidavit of Ms. Berg summarized the situation as follows:

Spousal support is very uncommon after a divorce in Sweden. The general rule is that the parties are responsible for their own support after a divorce. There is no right for a spouse to continue to live with the same standard as the higher income/higher educated spouse after a divorce. No claim for spousal support has been made in Sweden.

[36] Ms. Berg indicates that the Claimant could initiate a proceeding for child support in Sweden on behalf of the children, but she has not done so. She says there is currently no proceeding in relation to child support in Sweden, and the arbitrator in the Swedish proceeding relating to property division does not have jurisdiction to address child support issues.

- [37] The Claimant commenced the family action in this Court on January 17, 2020, seeking division of property, child and spousal support. A judicial case conference has not yet taken place and is scheduled for February 10, 2021.
- [38] The Respondent's position is that the division of property can most effectively be undertaken in Sweden, and that an unequal division of property in Sweden will address any outstanding claim for support under the FLA. The Respondent states in his affidavit: "Although I am not obligated to do so, it is my intention to address spousal support in the context of the property division arbitration in Sweden by volunteering an unequal division of property." If the Claimant was dissatisfied with the result, she could presumably apply to have the stay in British Columbia lifted once the Swedish proceedings were completed.
- [39] While I have no reason to doubt that the unequal division of property could be effected by way of mediation in Sweden, it is difficult to understand how unequal division would be the result of arbitration given the clear indications that spousal support is not a customary consideration. Presumably, the result of arbitration would be the equal division of property.
- [40] I fail to see how waiting for a result in dividing property in Sweden will make the proceedings in British Columbia more efficient. If the parties were able to find common ground through mediation, it would appear to make little difference where the mediation were to take place. The arbitration would therefore only become relevant if adjudication on property division is required.
- [41] The most onerous part of such adjudication would be making findings of fact on disputed issues, notably on the ownership and valuation of the companies. However, even if the Swedish court were to make findings of fact about the companies in the context of property division, I have been taken to no authority for the proposition that such findings could be relied upon by this Court in the context of assessing child and spousal support. In my view, declining to exercise jurisdiction would likely lead to a duplication of efforts between Canadian and Swedish courts as the assessment of corporate assets and income streams would clearly be relevant to both spousal and child support in addition to property division.
- [42] While it is clearly not for this Court to dictate to a foreign jurisdiction whether to continue with proceedings over which it has jurisdiction, I am confident that with appropriate case management and communication, the action in this Court could proceed in a manner that limited duplication and the risk of conflicting decisions.
- [43] In my view, this factor does not weigh against this Court exercising jurisdiction.

Enforceability of judgements

- [44] Based on the information before me, Sweden is a reciprocating jurisdiction neither under the Interjurisdictional Support Orders Act, S.B.C. 2002, c. 29 nor under the Court Order Enforcement Act, R.S.B.C. 1996, c. 78. While I recognize the Respondent's submission that there may be challenges enforcing an order relating to property in Sweden, it appears likely

that an order from this Court could be structured in a manner that would limit such challenges given the other assets to be divided. Conversely, the enforcement of support orders would appear to favour the exercise of jurisdiction by this Court as the Respondent's assets and income are primarily in British Columbia.

[45] In my view, this factor does not support declining to exercise jurisdiction.

Efficiency of the Canadian Judicial System

[46] The Respondent's primary arguments in favour of efficiency rely on the propositions that he has offered to pay child support in Sweden and that he would agree to an unequal division of property in lieu of spousal support. Such concessions could be advanced just as efficiently in the Canadian proceedings, notably at the Judicial Case Conference scheduled to take place in a few days.

[47] The Respondent's assessment of the efficiency of the processes based on a collaborative approach, while perhaps commendable, is also optimistic. When deciding on the most efficient approach to resolution of the issues, this Court must also consider the possibility the issues will only be resolved through litigation. Presumably, the parties could pursue a mediated settlement of the issues just as efficiently in either jurisdiction. However, should the issues need to be litigated I am of the view that it will be more efficient to do so in this Court for the reasons set out in the section addressing the multiplicity of proceedings.

[48] This factor does not favour declining jurisdiction.

Conclusion

[49] As noted earlier, the onus is on the Respondent to show why this Court should decline to exercise its jurisdiction and displace the forum chosen by the Claimant. I have found that none of the relevant factors favours this Court declining to exercise its jurisdiction. The application is dismissed.

[50] The Claimant shall have the costs of this application in any event of the cause.

"Edelmann J."

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Prepared on 29 October 2026 · Esheria