SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Armoyan v. Armoyan, 2012 NSSC 323

Date: 20120914
Docket: HFD 1201-065036
SFHCIV-070342
SFHMCA-068981
Registry: Halifax

Between:

Vrege Sami Armoyan

Petitioner

v.

Lisa Armoyan

Respondent

Judge: The Honourable Justice Douglas C. Campbell

Heard: Jurisdiction Hearing: October 24, 25, 26, 27, 2011 and August 20, 21, 22, 23, 24, 2012 in Halifax, Nova Scotia

Counsel: Gordon R. Kelly and Stacey O'Neill for the Petitioner
Mary Jane McGinty and Christine Doucet for the Respondent

By the Court:

[1] By a written judgement dated September 5, 2012 (*Armoyan v. Armoyan*, 2012 NSSC 317), I decided to accept and exercise jurisdiction with respect to all matters brought by the Petitioner to this Court. This outcome had been contested by the Respondent. The circulation of that decision was time sensitive because a Court in Florida was scheduled to decide the merits of the case on that same date. My decision was issued with reasons to follow. I had completed my review of the evidence and arguments from which I had reached a decision to accept jurisdiction. I did not have sufficient time prior to the scheduled hearing in Florida to articulate my reasons in writing. This addendum records my reasons.

Background:

[2] The parties were married in Toronto, Canada on October 10, 1993 and resided there until they moved to Halifax, Nova Scotia in 1996. Their first child, Jonathan, was born on April 29, 1995 while the couple lived in Toronto and is currently 17 years of age. Two more children, Victoria and Christina, were born on September 16, 1996 and November 7, 1998 respectively while the family lived in Halifax. They are 15 years and 13 years old.

[3] The Petitioner was born in Syria but relocated to Nova Scotia, Canada at a young age. Both parties and their three children are Canadian citizens. The family was ordinarily residents and lived in Nova Scotia from 1996 until at least the summer of 2007. The parties disagree on how to characterize their residential circumstances thereafter.

[4] The parties separated in October 2009 while in Florida, USA. Currently, there are proceedings in Nova Scotia in this Court and in the Circuit Court of the 15th Judicial Circuit for Palm Beach County, Florida, USA (hereinafter referred to as the "Florida Court") with respect to issues arising from that separation. The Respondent seeks to have all issues dealt with in Florida; the Petitioner proceeds in Nova Scotia where the Respondent seeks a stay on the basis that this Court has no jurisdiction over certain issues and in any event should not exercise whatever jurisdiction exists.

[5] The basis upon which the Respondent contests jurisdiction is:

a) Jurisdiction *simpliciter* in relation to the Petitioner's claims pursuant to the *Divorce Act*, R.S., 1985, c.3 (2nd Supp) (hereinafter referred to as the "Divorce Act") and the *Maintenance and Custody Act,* R.S., c. 160, s.1; 2000, c. 29, s.2 (hereinafter referred to as the "MCA"); and,

b) *Forum non-conveniens* in respect of the Petitioner's claims under the *Divorce Act*, the MCA and the *Matrimonial Property Act*, R.S., c. 275, s. 1 (hereinafter referred to as the "MPA") and his claim in the *Lis Pendens* proceeding.

MCA proceeding:

[6] In the MCA proceeding, the Petitioner seeks to register the marriage contract as an order of this Court and also seeks an order for custody of Jonathan. At trial, the Petitioner confirmed in evidence that he withdraws any claim for relief with respect to the custody or parenting of Jonathan or the other two children whose custody was claimed in the *Divorce Act* proceeding. Accordingly, the jurisdictional challenge with respect to that part of the proceeding in both statutes is redundant. Given that change in pleadings and because of other factors that need not be articulated, I have decided that the Florida Court is the more appropriate forum in relation to parenting issues.

[7] While it will be necessary for this Court to make an inquiry as to whether it has and should exercise jurisdiction pursuant to the MCA in relation to the registration of the marriage contract, my decision to do so (as outlined in my decision of September 5, 2012 above-noted) will be somewhat moot until a decision is made on the merits as to whether the contract should be adopted or varied in whole or in part. That decision can only be made after a trial is heard on that question.

Divorce Act proceeding:

[8] The Petitioner's Divorce Petition, commenced on December 22, 2010, sought an order for custody, access and costs as well as an order that the Marriage Contract between the parties determines their respective rights and obligations to a property division and spousal support by virtue of the MPA which authorizes the

making of a marriage contract. It is noteworthy that as a matter of procedure, claims under the MPA can be pleaded in a Divorce Petition. This is done for efficiency and does not change the fact that the action under the MPA is separate from those pleadings which arise from the *Divorce Act*.

[9] The Respondent filed a response to the MPA proceeding requesting an order that the Court decline to exercise jurisdiction by virtue of the provisions of the *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003 (2nd Sess.), c.2 (hereafter referred to as the "CJPTA") and the common law. In the alternative, the Respondent seeks to set aside the marriage contract or in the further alternative to vary its terms by substituting reasonable terms.

[10] The Respondent's contest over jurisdiction is founded first in the assertion that the Petitioner had not been ordinarily resident in the province of Nova Scotia for a period in excess of one year as required by Section 3(1) of the *Divorce Act* (jurisdiction *simpliciter*) and in the alternative that jurisdiction should be rejected on the principle of *forum non conveniens*.

The Florida Court Proceedings:

[11] On or about October 19, 2009, the Respondent commenced a proceeding in Florida that appears similar to a *Divorce Act* proceeding in Canada referred to in Florida as a Verified Petition for Dissolution of Marriage. The relief sought included orders for shared parenting, child support, medical and dental insurance for the children, distribution of marital assets and liabilities, temporary equitable distribution of marital assets and a request for exclusive use and occupancy of the marital residence at Boca Raton, Florida.

[12] An amendment made a claim for "separate maintenance" pursuant to Florida Statute 61.09. This Court heard expert testimony from a Florida lawyer who explained that this rarely used statute allows the Florida Court to award temporary maintenance for spouses and children without having determined jurisdiction and without prejudice to jurisdictional claims.

[13] Attempts by the Petitioner to move to have the Florida action dismissed based on lack of jurisdiction were not successful and the process in Florida has continued to be active.

Residence History:

[14] For approximately 11 years, this family resided in Halifax, Nova Scotia, Canada. They moved to Toronto, Ontario, Canada for approximately ten months for the 2007/2008 school year and resided in rented accommodation there. During this time the family residence at 855 Marlborough Woods, Halifax (herein after referred to as “855") was maintained, furnished and secured. There is some dispute as to the facts surrounding the family’s residence during the summer of 2008. The Petitioner was out of the country for a period of weeks. The Respondent and children lived in alternate rented accommodation in Toronto for a short period of time after their lease had expired. The family returned to Halifax for some portion of that summer. The Petitioner, himself, came to Halifax and stayed at 855 during that school year from time to time.

[15] A decision evolved by which the family would relocate to Boca Raton Florida, USA. The parties have opposite perspectives about how that had developed. The Petitioner placed considerable emphasis on a mutual desire to try a fresh start in Florida as part of a plan to revitalize their marriage which had faced difficulty. A company in which he had an interest gave him a contract of employment by which he would pursue certain business interests in Florida for the company. The letter of employment confirms that he may be required to relocate the family to Florida for as much as three years. A one-year employment non-immigration visa, sponsored by the company was obtained. The family moved there for the school year 2008/2009 and lived in rented and furnished accommodation.

[16] As was the case with the previous year, the Halifax family residence was owned, furnished and secured throughout. Although there is some dispute on the evidence as to the frequency of the husband’s travel from Florida to Halifax, it is not denied that he did so during that year.

[17] While there is some dispute in the evidence about the family intentions with respect to residence thereafter, it is common ground that the family returned to Halifax in the summer of 2009 so that their daughter could have surgery. Ties to the Florida residence were not broken in the sense that the lease on the residence there was continued along with certain utilities and other bills. Contact and

placement opportunity for the children in private school there was kept open although there was also some dialogue with a local Halifax private school for the children. The parties disagree as to whether those openings were established for the beginning of the school year in September 2009 or for the January 2010 semester of the following year or even the September session that followed. The family returned to Florida for the 2009/2010 school year.

[18] By mid-October 2009, the parties separated while physically located in Florida. Initially, a Florida Court Order prohibited the Petitioner from leaving Florida but on December 8, 2009 he, upon providing funds to the Respondent, was given permission to leave. He returned to Nova Scotia. By November 18, 2009 the Petitioner's employment assignment was terminated and later his immigration sponsorship was withdrawn.

[19] Following the separation of the parties, the Respondent and the two younger children remained in Florida. Their oldest child, Jonathan had been attending a private school in Toronto, Canada and living with his maternal grandparents and that status continued after the separation. The children have had some contact (that could only be described as minimal) with their father and are in the primary care of their mother.

[20] The residency or at least whereabouts of the Petitioner after December 8, 2009 will be discussed in more detail below.

Divorce Act Jurisdiction based on Jurisdiction *Simpliciter* :

[21] By virtue of section 3(1) of the *Divorce Act*, jurisdiction *simpliciter* is established by a one-year ordinary residency history by either spouse prior to the commencement of the proceedings. That section states:

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

[22] The term "ordinarily resident" is not defined in the *Act* but has been the subject of considerable comment in the case law.

[23] In *Quigley v Willmore* 2008 NSCA 33, the Nova Scotia Court of Appeal reviewed the relevant case law and listed the following themes at paragraph 21:

> 1. The determination of ordinary residence is highly fact specific and a matter of degree;
>
> 2. Ordinary residence is in contrast to casual, intermittent, special, temporary, occasional or exceptional residence;
>
> 3. Ordinary residence is distinguished from a stay or visit;
>
> 4. A person's ordinary residence is where she is settled-in and maintains her ordinary mode of living with its accessories, relationships and conveniences, or where she lives as one of the inhabitants as opposed to a visitor;
>
> 5. An ordinary residence may be limited in time from the outset or it may be indefinite or unlimited; and
>
> 6. Ordinary residence is established when a person goes to a new locality with the intention of making a home there for an indefinite period.

[24] Castel and Walker, the authors in the leading text Canadian Conflicts of Laws sixth edition (Toronto: Lexis Nexis Canada Inc., 2005-2011) discuss the term "ordinary residence" at 4-17:

> "..... in England and Canada, the courts have adopted the real home as a test of ordinary residence. The inference is strong that the inquiry must be directed at finding the one true home among several places of residence..... The considerations called into play by the court attempting to determine the real home are: physical presence, the nature of the absence from the place, the availability of upkeep of the physical residence. It is evident, however, that all of these considerations are directed at identifying the place where the individual regards himself or herself as having a permanent settlement to which he or she intends to return."

[25] Although the Petitioner had issued and amended an earlier Petition for Divorce, it has been discontinued. The operative Petition was issued by the Petitioner on December 22, 2010. It follows that the time-frame during which the

Petitioner must have been resident in Nova Scotia in order for jurisdiction *simpliciter* to be established is the entire year commencing on December 22, 2009.

[26] It is important to note that the one year ordinary residence requirement of the *Divorce Act* applies to the Petitioner or the Respondent but not necessarily both. Competing evidence was presented to the Court to support the opposite contentions that the Petitioner was or was not residing at 855 in Halifax during that relevant one year time period after December 2009 or for portions of it. 855 is the property which had been the family's home preceding much of the time before the family moved to Toronto, Canada for one school year, 2007/2008.

[27] Rather than to embark on a detailed attempt to chronicle the residential whereabouts of the Petitioner during the relevant one year period ending on December 22, 2010, it may be more efficient to eliminate those places where he attended in circumstances that could not constitute "ordinary residence". Counsel for the Respondent prepared a calendar of that one year which color- codes the places attended by the Petitioner. In cross-examination, the Petitioner generally conceded, with the exception of a few days, that the calendar depicts his whereabouts internationally. That document is Exhibit 56.

[28] The calendar shows that the Petitioner was in Ottawa, Ontario, Canada for a number of days visiting relatives often with his son Jonathan attending. He could not be said to be ordinarily resident in Ottawa. He was in Boston, USA for a few days. There is no suggestion that he was ordinarily resident there. He was in Florida for many days that year but his evidence was that it was always for the purpose of attending Court proceedings in the Florida Court or to visit his children. As such, he was not ordinarily resident in Florida that year. He was in Toronto for a few days on business or to visit his son.

[29] The calendar shows that The Petitioner was in Lebanon from approximately May 21 2010 to September 6, 2010, being roughly fifteen weeks. For the balance of the days in that twelve month period, he was in Halifax residing at 855. Exhibit 56 suggests that he was in Halifax for about twenty eight weeks that year interrupted by the various trips to Florida, Ottawa, Toronto, Boston and Lebanon above referenced. Counsel for the Respondent conceded that Halifax and Lebanon are the only two places that could possibly be construed as representing the ordinary residence of the Petitioner for portions of the relevant one year. The

question therefore is whether or not Lebanon was the Petitioner's ordinary residence for a time during that year such that ordinary residence in Halifax for one year was interrupted and therefore has not been established.

[30] The Petitioner owned a yacht which was then being kept in Lebanon. When he was in Lebanon for the above time frame, he lived on his yacht and traveled from it to pursue various business and personal interests in Lebanon and Syria.

[31] It is important to note that the Petitioner is a man who had enjoyed a very substantial net worth which was conceded to measure into the tens of millions of dollars at one point in time. He had international connections, having been born in Syria and having substantial business interests . As such, it would not be surprising that his presence would be spread among various international locations. The fact that he spent a number of weeks in Lebanon that year does not, in and of itself, establish that he was ordinarily resident there. The length of his stay there is not determinative of this issue.

[32] It is equally important to recognize that the two school years that the family lived in Toronto and Florida respectively are irrelevant to the within discussion because those time frames, along with the early fall of 2009 time spent in Florida, predate the one year of residence requirement prior to the commencement of the Divorce proceeding on December 22, 2010. Even if the Petitioner's ordinary residence changed from Halifax to Toronto and then to Florida (which is a conclusion I would not make), he did not return to ordinarily reside in either of Toronto or Florida during the one year relevant to this inquiry.

[33] Based on the comments in the Quigley decision above-noted and the summary of the learned authors quoted above along with other case authorities to which I was referred, I have concluded that the Petitioner was in fact ordinarily resident in Halifax, Nova Scotia, Canada at 855 for at least twelve months preceding the commencement of the Divorce petition on December 22, 2010. Despite his many connections with locations around the world, I have concluded that the Petitioner was a resident of Canada and a resident of Nova Scotia within Canada for the relevant year and more. His residence at 855 had a long-standing history and was his favorite home. His yacht in Lebanon was a pleasure location. He was sojourned in Lebanon for the time that he stayed there in 2010.

[34] To borrow from the words of the Quigley decision, the Petitioner's time on his yacht in Lebanon was casual, special, temporary and exceptional as a residence; it was a stay or a visit and not a residence; he was not settled in there and it did not constitute his ordinary mode of living given his many connections with Nova Scotia and, he did not go there with the intention of making a home for an indefinite period.

[35] The words of the authors above quoted apply to the Petitioner. The property at 855 was the Petitioner's real home and that is the test of ordinary residence. There is a strong, perhaps irrefutable inference that 855 was the Petitioner's one true home among several places where he could stay. He had a physical presence at 855. His absence while in Lebanon was in pursuit of a healing process for him and for business. His home at 855 was the place which he regarded at the relevant time (being the commencement of the proceeding and the year prior to that) as representing a permanent settlement to which he would return from his sojourn to Lebanon.

[36] It is true that the Petitioner eventually sold 855 and moved in to live in a penthouse in property owned by his brother in Halifax. However that happened a number of months after the commencement of the petition and is therefore irrelevant to the question of where he was ordinarily resident at the commencement of the petition and for the proceeding year.

[37] It is also true that there was evidence from the Respondent, disputed by the Petitioner, that he had expressed a plan or at least an interest in selling 855 much earlier in time. That is also not determinative. Given that I have concluded that the Petitioner was not ordinarily resident in Lebanon during the one year and was not ordinarily resident anywhere else in the world and given his physical presence at 855 and his intentions with respect to it, I feel compelled to conclude that during the relevant twelve months, the Petitioner was ordinarily resident at Halifax, Nova Scotia, Canada and that accordingly he has established Jurisdiction *simpliciter* as required by Section 3(1) of the *Divorce Act*.

[38] There are several facts that will be referred to below in the discussion relating to the principle of *forum non conveniens* which would also bare some relevance to my finding that the Petitioner was ordinarily resident in Nova Scotia

for the required year. I am referring only to those facts which existed during the relevant twelve months. For purposes of efficiency I will not repeat them here.

Abuse of Process:

[39] The Respondent argues that the proceedings in Nova Scotia created a parallel proceeding with the proceedings in Florida and as such constitute an abuse of process which should cause this Court to stay the Nova Scotia proceedings pursuant to Civil Procedure Rule 88. At pages 8 and 9 of her Brief to the Court, counsel for the Respondent notes that fourteen months passed between the date when the Respondent commenced proceedings in Florida and the date when the Petitioner filed his petition for Divorce in Nova Scotia. That fact is true but is presented out of context if that passage of time is relied on as part of the rationale for a finding of abuse of process.

[40] The Respondent was the first to file court proceedings in relation to the marriage breakdown and she did so by filing a Verified Petition for Dissolution of Marriage in Florida on October 20, 2009. By November 3, 2009, some two weeks later, she obtained a *Writ of Ne Exeat* which meant that the Petitioner could not leave Florida until he was released from it on December 2, 2009. The Petitioner returned to Nova Scotia on December 8, 2009 and filed a Divorce Petition in Nova Scotia on that day. In short, it was less than two months between the filing dates by the parties of matrimonial proceedings in the two jurisdictions and the Petitioner did so as soon as he could be physically present in Nova Scotia.

[41] It is true that the Nova Scotia petition was ultimately discontinued on December 22, 2010 when he re-filed a new Petition for Divorce on the same day. His evidence was that he did so because the Respondent had by then raised questions as to whether he was ordinarily resident in Nova Scotia for the required one year prior to that first petition. I interpreted his evidence to mean that he was motivated to discontinue and recommence because by then he was physically present in Nova Scotia for the required year except for his absences (principally the sojourn to Lebanon above referred to) and because he might by doing so, avoid the allegation that his lack of physical presence in Nova Scotia determines his claim of ordinary residence here.

[42] Thus he was not conceding that he was not ordinarily resident for the one year preceding the commencement of the first petition. He was merely eliminating the contrary allegation. I need not decide that point.

[43] Accordingly, I would assess the parallel proceedings in the context that the competing filings in the two countries were less than two months apart at their respective commencement dates and that most of the various subsequent steps taken by the Respondent in Florida were taken while and an as yet unimpeached preceding was alive in Nova Scotia even though one of those was eventually discontinued and recommenced on the same day some fourteen months later. Also, she did so in the face of a marriage contract that chose Nova Scotia as the required forum.

[44] I would not diminish the significance of the fact that the Respondent, even at the time of commencing her Florida action, probably took the position that the marriage contract was not valid. Nonetheless, she would know or ought to have known that the Petitioner would be relying on the marriage contract as to choice of forum and that duplicity of proceedings were very probable, if not inevitable, if she were to commence proceedings in Florida. I do not mean to imply that the Florida litigation initiated by the Respondent represented an abuse of process by her; however, I feel compelled to conclude that her earlier filing in Florida in the above circumstances should not be a bar (because of the concept of process abuse) to the Petitioner's claim that jurisdiction *simpliciter* has been established in the Nova Scotia proceedings.

[45] Below I will be reviewing a number of facts that bear on the question of *forum non conveniens*. Certain of those facts that will cause me, below, to conclude that there is no forum more convenient than the Nova Scotia Court, are also relevant to this analysis as to whether the Petitioner committed an abuse of process. This is so because the same facts that cause me to conclude that Nova Scotia is the more convenient forum also can be relied upon by the Petitioner in his decision to bring the action here and should perhaps have been noted by the Respondent before making her choice to litigate in Florida. For efficiency, I will not repeat those facts here.

Forum Non Conveniens:

[46] Having determined that there is no lack of jurisdiction to hear the Divorce proceeding based on the statutory requirement of one year of ordinary residence or because of an abuse of process by the Petitioner, it is necessary to further examine whether this Court should exercise or defer jurisdiction in favor of Florida jurisdiction based on the principle of *forum non conveniens*. Because that principle will also determine whether this Court should exercise jurisdiction for the MCA proceedings, the MPA preceding and the *lis pendens* preceding, this discussion relates to all of the above actions.

[47] The forum selection clause in the marriage contract impacts the discussion of the *forum non conveniens* principle. The CJPTA acts as a codification of the test for *forum non conveniens*. In *Teck Comino Metals Ltd. v Lloud's Underwriters*, 2009 SCC 11, the Supreme Court of Canada indicated at paragraph 22 that section 11 of the CJPTA was intended to codify the *forum non conveniens* test and not to supplement it.

[48] Essentially the doctrine contends that a court must decline to exercise its jurisdiction if in all the circumstances there is a forum which could more conveniently dispose of the issues. This involves an analysis of all the facts that would bear on such a finding.

[49] In his Brief to the Court, counsel for the Petitioner at page 37 listed the following factors to support his clients' contention that this Court offers the most convenient forum over all others. These are:

1. Both parties and all the children are Canadian citizens;

2. The parties' stay in Florida was permitted by way of temporary non-immigrant visas which were revoked when the Petition returned to Nova Scotia and replaced by the Respondent with a non-immigrant student visa;

3. The parties lived in Nova Scotia from 1996 until at least August 2007 and the Petitioner continues to live here whereas the parties were together in Florida for just over one school year while the Respondent and children stayed there beyond that time, only after the separation;

4. The parties signed a marriage contract in Nova Scotia with a governing law and exclusive forum selection clause in favor of Nova Scotia after each obtained independent legal advice from Nova Scotia lawyers; and

5. The Respondent concedes that this Court has jurisdiction *simpliciter* regarding her response application under the MPA and that she has attorned to this jurisdiction with respect to same.

[50] In addition to those facts, which I accept as relevant, the following facts are also relevant:

1. The very valuable residence that constituted the matrimonial home of the family from 1996 to 2007 is located in Halifax, Nova Scotia, Canada and was maintained, furnished and secured throughout the family's absence from the province first in Ontario then in Florida. The family returned to it in the three intervening summers;

2. The Petitioner had various ongoing business interests and activities in Nova Scotia throughout the time when he was living outside Nova Scotia and he returned to Nova Scotia to pursue those activities with some frequency;

3. The Petitioner maintained a number of community, religious, professional and recreational activities in Nova Scotia during the time periods when he lived elsewhere;

4. At the time of the separation of the parties most, if not all, of the Petitioner's assets whether held personally or in companies in which he had an interest, were located in Nova Scotia. Subsequent to the separation, the Petitioner transferred approximately $23 million to the Middle East in 2010. The Petitioner's yacht is located in Lebanon. Other sums of money have also been transferred to the Middle East subsequently. There remains substantial assets in Nova Scotia including investments at National Trust, RRSPs, vehicles and a promissory note for the balance of the proceeds of a $3 million sale of the matrimonial home to the Petitioner's mother. The total value of these Nova Scotia assets fluctuates considerably but by the time of separation their value was several million dollars, including the value of the promissory note.

5. Significantly, there are no assets owned by either party in Florida. The Respondent's accommodations are rented and the Court is unaware of any assets which she has in Florida other than personal effects.

6. As has been decided above, the parties' move first to Toronto and then to Florida for one school year followed by the commencement of the second school year were not intended to be permanent. The Petitioner's employment contract in Florida suggested an upper limit of three years and that his employment there in fact lasted one school year plus a maximum of three months into the next school year.

[51] In the summer of 2008, as the parties were about to move to Florida for the first time, the Petitioner requisitioned a tax opinion from the firm Deloitte & Touche, Chartered Accountants to address his desire to maintain his Canadian residency for tax purposes. Although the definition and the concept of residency for tax purposes may be different from the concept of ordinary residence for purposes of establishing court jurisdiction, the list of factors relied on by the Accountant and his opinion that the plaintiff would not lose Canadian residency for tax purposes are helpful to this inquiry. The opinion letter is dated July 25, 2008 and is found in Exhibit 52 at tab 6. Regarding the Petitioner's ties to Canada, that letter identifies the following facts:

1. He would be retaining his residence in Halifax;

2. He would continue his membership in various Canadian social, recreational and religious organizations;

3. He would continue his membership in the Canadian Professional Engineers Association and YPO Canada;

4. He would have investments in Canada including RRSPs, RESP's, substantial non-registered investment accounts and related margin loan accounts;

5. He would continue to use personal stationery and business cards with a Canadian address;

6. He would remain a shareholder of several Canadian companies requiring his involvement in business relationships and contract endorsements in Canada;

7. He would remain as a corporate director of the Royal Host REIT and president of certain Canadian companies;

8. He would return to Canada regularly for business and personal reasons;

9. Positions for the children in private school in Toronto would be maintained in anticipation of their return.

[52] Factors that would support a conclusion that the Petitioner would not be establishing sufficient ties with the US were also listed as:

1. He is **not** a US citizen or green card holder;

2. He has requested an LIA visa which would entitle him to remain in the US for one year;

3. He had been in the US for approximately 7 days at that point in the year 2008 and less days in earlier years;

4. He would intend to arrange to be outside of US for whatever days are required in the remainder of 2008 to remain a nonresident for the US for that year;

5. He had arranged for a short-term rental of a home while in Florida on a lease of 10 months duration;

6. His family will accompany him to Florida;

7. He would open one US Bank account for convenience purposes intend to set up any other banking, investment loans or credit card accounts in the US;

[53] I have concluded that all of the above listed factors are consistent with the evidence before me and I consider that they assist me in concluding that the Petitioner's ordinary residence for all the time that he spent in Florida in 2008 and 2009 was more likely to be in Nova Scotia, Canada than in Florida, USA. If it is probable that he was a resident of Nova Scotia during all of 2008 and 2009 when he lived in Florida , it is even more clear that he was ordinarily resident in Nova Scotia (as opposed to Florida where the only other available forum is located) for

the required one year time frame prior to the commencement of his Petition for Divorce on December 22, 2010 (which is the time frame after he left Florida except to visit there as referred to herein).

[54] Before this Court should decline to exercise its jurisdiction on the matters brought before it, it must determine not only that there is another jurisdiction where the matters could be heard but that the case would more conveniently be heard there. If not, this Court should exercise its jurisdiction to hear all matters.

[55] While there has been no trial readiness discussions between counsel and the Court given that the Court is only now dealing with its decision whether to exercise jurisdiction, the evidence before the Court on this preliminary hearing provides some insight as to how the trial would go.

[56] Because the two younger children reside with their mother in Florida and the oldest child returns there from private school in Toronto, it is likely that there would be a number of witnesses in Florida with important testimony about parenting issues, some of whom are professionals. However, the Petitioner has withdrawn his claims for parenting issues and therefore there will be no need for Florida witnesses to come to Nova Scotia to testify about parenting.

[57] It can be anticipated that there will be a need for various witnesses to testify about the value and history of acquisition of various financial assets. Marketable securities were managed in Nova Scotia and persons from that investment firm would be probable witnesses. The operating companies in which the Petitioner had an interest and from which he derived net proceeds of about $23 million are located largely in Nova Scotia and possibly Ontario. In any event they are not in Florida.

[58] If there should be a need for testimony from family members on either side, I have evidence that some possible candidates are in Ontario and others are in Nova Scotia. I have no evidence that any family members of the Respondent and her children reside in Florida.

[59] I have a vague expectation that there are certain professional or quasi-professional persons in Florida who might be witnesses for the Respondent. For example, the contents of a laptop computer were copied and analyzed in Florida

by a person with technical ability. The admissibility of those documents is in dispute and therefore it is possible, yet unclear, as to whether any such witness from Florida would be required in Nova Scotia. There may be other persons who would be required to travel from Florida to testify in Nova Scotia. However, on balance I have concluded that the main witnesses are in Canada and, of those most are in Nova Scotia.

[60] The Court heard expert testimony from a lawyer in Florida with respect to family laws there. Unlike the MPA which distinguishes matrimonial assets from business assets and presumptively exposes only the former to division between the spouses, the Florida law would divide all of the property in an equitable way. A second difference was that costs in Florida are normally awarded against the party most able to afford to pay whereas here, costs are more likely to follow success of a party. Counsel for the Petitioner argues that the Florida law would represent a "juridical advantage" to the Respondent and a corresponding disadvantage to the Petitioner.

[61] Counsel cites the case of *Amchem Products Inc. v British Columbia*, [1993] 1 S.C.R. 897 as authority for the proposition that the Court should adopt juridical advantage as a reason to decline to defer jurisdiction. He quotes Justice Sopinka at paragraph 55 as follows:

> When will it be unjust to deprive the plaintiff in the foreign proceeding of some personal or juridical advantage that is available in that forum?..... The appropriate inquiry is whether it is unjust to deprive the party seeking to litigate in the foreign jurisdiction of the juridical or other advantage, having regard to the extent that the party and the facts are connected to that forum based on the factors which I have already discussed. A party can have no reasonable expectation of advantages available in a jurisdiction with which the party and the subject matter of the litigation has little or no connection. Any loss of advantage to the foreign plaintiff must be weighed as against the loss of advantage, if any, to the defendant in the foreign jurisdiction if the action is tried there rather than in the domestic forum. I have pointed out in my discussion on the test for determining *forum non conveniens* that loss of juridical advantage is one of the factors... .

[62] I would conclude that the foreign party (the Respondent) should not be given a juridical advantage in asset division and costs by disentitling the domestic party (the Petitioner) to the laws of this family's country of citizenship. This Court would take very little comfort from the possibility that the foreign Court

may be required to apply Nova Scotia law. That is so for two reasons. First, there has been no such determination. Second, the application of foreign law by a Court is awkward, at best.

[63] Additionally, because the assets and incomes of the separated family are not located in Florida, and are in part located in Nova Scotia, it is arguable that enforcement of any order obtained would be more convenient to the Respondent if the matter is heard in Nova Scotia. Counsel for the Respondent disagrees and argues that enforcement is possible even if the judgment comes from Florida. I do not disagree that enforcement is possible but I must accept the notion that it is more cumbersome from Florida.

[64] The CJPTA provides in Section 4 that:

> 4. A court has territorial competence in a proceeding that is brought against a person only if....
>
> a) During the course of the preceding that person submits to the court's jurisdiction;
>
> b) There is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding... ; or
>
> (c) There is a real and substantial connection between the Province and the facts on which the proceeding against that person is based."

[65] Section 12(2) of that *Act* lists mandatory but non-exhaustive factors to determine whether this or another Court is the more appropriate forum. These are:

> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
>
> (b) the law to be applied to the issues in the preceding;
>
> (c) the desirability of avoiding multiplicity of legal proceedings;
>
> (d) the desirability of avoiding conflicting decisions in different courts;

(e) the enforcement of an eventual judgment; and

(f) the fair and efficient working of the Canadian legal system as a whole.

[66] In my view the first two and the last two of these listed factors favor a conclusion that the most convenient forum is Nova Scotia. The middle two factors might be seen to favor a deferral of jurisdiction to the Florida Court because that would consolidate the issues in one court and eliminate duplicity of proceedings and conflicting awards.

[67] On the other hand, those factors are not determinative of the choice of forum. They merely require the Court to assess the desirability of avoiding those outcomes. Duplicity and conflicting outcomes could also be avoided if the Florida Court chooses to decline jurisdiction or if the Respondent chose to withdraw her claims there. Further, even if this Court declines jurisdiction there may still be a multiplicity of proceedings in the sense of enforcement proceedings. There will also be the question of conflict of laws if the marriage contract were to be adopted in Florida which then would arguably need to apply Nova Scotia law.

[68] After hearing all the evidence in considering all the arguments of both parties, I have concluded that there is no more convenient forum than the Nova Scotia Court.

The Marriage Contract:

[69] To some extent an analysis with respect to whether or not the choice of forum clause and the choice of law clause in the marriage contract binds the parties to a Nova Scotia forum is somewhat moot given my decision that this Court has jurisdiction simpliciter and is the more convenient forum. In other words, even if there were no marriage contract at all, the above discussion would lead to the matters being litigated here.

[70] However, it may be necessary to comment briefly on the issues raised in case my conclusion with respect to convenient forum is found to be wrong.

[71] The Court faced a dilemma with respect to its analysis of the impact of the marriage contract on the choice of forum issue. This was discussed with counsel

at various preliminary stages prior to the commencement of the jurisdiction hearings. It was my opinion that the question of whether or not the marriage contract is valid according to the MPA principles and other common law contract principles and whether it should be varied or set aside pursuant to the MPA was a substantive issue. It follows from my conclusion that this Court should not rule on those points until it was first decided whether or not to accept jurisdiction generally. In the end, the jurisdiction issue was presented on the presumption that the marriage contract is valid. In my opinion, this approach does not bind the trial Judge in dealing with the validity or variation of the marriage contract.

[72] Counsel for the Respondent argues that the choice of forum clause fails because it is not clear in expressing an intention the Nova Scotia's jurisdiction is to be exclusive. Paragraph 20 of the marriage contract requires that ".... any court action taken in connection with any of the matters outlined herein is to be brought in the Courts of Nova Scotia and no other jurisdiction." In my opinion those words would represent an exclusive choice of forum even if the first quoted phrases were not fortified by the final words "and no other jurisdiction".

[73] Counsel for the Respondent also argues that the reference to the choice of law being that of Nova Scotia which in turn would trigger the CJPTA would require the application of the law of the last habitual residence which she argues would be Florida. In my view contracts should be interpreted so as to avoid absurdity. There could be no doubt that the intention of the parties was to indicate a choice of Nova Scotia Courts which in turn would apply its own substantive laws which include the Divorce Act, the MPA, the MCA and the common-law principles that relate to the *lis pendens* action. To conclude otherwise is to suggest that the parties would intentionally litigate their issues in a Nova Scotia Court and encumber themselves with all the practical problems associated with having that Nova Scotia Court apply foreign law. That is not a reasonable interpretation, in my opinion.

[74] A decision on forum with respect to the MCA proceedings may have very little practical effect in the end. I do not hesitate to include that preceding in my direction that all matters would be heard in this Court. I note however that the proceeding under MCA involves only two points of relief. The first is custodial matters relating to the child Jonathan. That matter has now been withdrawn.

[75] The only remaining item relates to the request for a declaration that the marriage contract can be registered pursuant to that Act. In the course of the trial it is anticipated that the Respondent will seek to set aside or vary the agreement in whole or in part. In the event that such a request is granted, it would be impractical to record an agreement that is to be varied. Accordingly, it will be incumbent upon the trial Judge to first determine whether the agreement should be varied or set aside before deciding whether it can be registered.

[76] If my inquiry were at an end at this point in my decision, I would have overwhelmingly reached the conclusion that this Court has jurisdiction and is the most convenient forum and that it should therefore hear all of the matters brought before it in these various proceedings. However there is one final concern and that arises from the fact that the Florida Court has already accepted jurisdiction.

The Florida Court's Position:

[77] While there were proceedings in both Florida and Nova Scotia since at least October and November 2009 respectively, there was no acceptance of jurisdiction in either court until relatively recently. The history of some of that litigation follows. On October 20, 2009 the Respondent filed her petition for Dissolution of Marriage in Florida. As mentioned above, there is a statute in Florida that allows the court to make a support order without first accepting jurisdiction. Expert testimony from a Florida Lawyer appearing before this Court suggested that access to that statute is relatively rare. Such an order was made in this case and it provided eventually for $25,000 per month in combined spousal and child support along with a retroactive amount.

[78] In the Nova Scotia proceeding, there were certain preliminary issues to be dealt with before the matter could go ahead to trial. For example, there was a hearing in this Court to determine whether the doctrine of *Res Judicata* would apply so as to bind this Court to accept the admissibility of certain documents copied from a laptop computer by the Respondent allegedly without the Petitioner's required consent. Such documents had been admitted in the Florida proceeding. Time went by while that issue was heard and rejected by me which decision was eventually upheld on appeal here.

[79] The Appeal Court in Florida ordered a new trial regarding its lower court finding subsequent to my finding.

[80] The question of jurisdiction was set for dates which became adjourned. Up to a point shortly before that scheduled date it would appear to be relatively clear that the Florida Court was at least entertaining the idea of deferring jurisdiction to this Court. Judge Martz of the Florida Court gave a decision on April 21, 2011 in which he deferred dealing with the matter stating in part:

> ".... I'm going to wait until after the June hearings in Canada to make my decision on forum non conveniens. With any luck at all, we'll get an answer to that we can all live with. That will end up having this issue in one court. I'm hoping they do, because I think that's the better of the two. I'm not going to deny it outright because I want to see what happens there...".

[81] As it turned out the June 2011 dates were adjourned and the matter was set for four days in October 2011. Unfortunately, that was insufficient court time and the matter had to be adjourned to resume on certain dates in February 2012. As those dates approached, circumstances affecting counsel for the Respondent justified a further adjournment. Counsel for the Petitioner did not object to the adjournment provided the delay would not prejudice his client.

[82] To avoid that prejudice, the Court agreed with the suggestion from counsel that a condition of the adjournment would be that the Respondent would not advance her case with respect to Florida's accepting jurisdiction until after my decision was available following those adjourned dates on August 20 to 24, 2012. I was aware that this Court could not bind the Respondent to refrain from proceeding in Florida but counsel urged me to make that condition to position him to complain if that condition should be breached. The date of this Court's decision on the motion to adjourn was February 24, 2012.

[83] In the meantime, the Petitioner had defaulted in the monthly payments of the Florida separate maintenance order after payment in January 2012. As a result a number of contempt appearances and other enforcement processes were underway in Florida. On April 4, 2012 the Florida Court determined that it would take jurisdiction over all of the issues before it including the validity of the marriage contract and it dismissed the Petitioner's motion to dismiss the Florida

proceeding for lack of subject matter jurisdiction and *forum non conveniens*. This development was expected to be avoided by the condition which I added to allowing the Respondent's request to adjourn the February 2012 dates to August 2012. Therefore, the prejudice to the Petitioner envisaged by his counsel actually materialized despite the adjournment condition which I imposed to protect against prejudice.

[84] I understand that there was a hearing set for September 5, 2012 in Florida to entertain the motion for an order on the merits with respect to child and spousal support that would replace the separate maintenance order. I issued my decision to accept jurisdiction early on that same date but that decision did not contain reasons because of insufficient time to do so.

[85] Having concluded above that I would otherwise accept jurisdiction, I have wrestled with the question of whether I should decline to do so because of the fact that the Florida Court has accepted jurisdiction. On the assumption that the Florida Court has already or otherwise may soon make an order quantifying child support and spousal support and possibly in relation to other remedies sought, my decision to accept jurisdiction could result in competing orders in the two jurisdictions which may or may not have different impacts. This Court would prefer to avoid this duplicity of court orders because chaos may otherwise result in terms of enforcement.

[86] I have been provided by both counsel with excellent legal briefs with respect to the concept of comity. Simply put, that doctrine calls for this Court to respect the decision of a competing court in another jurisdiction where that court operates on similar and recognized principles of law. It arises out of a sense of courtesy and respect for the other court. There is no question that the Florida Court is such a court that is fully recognized in Canada.

[87] I have considered all of the cases presented to me by both counsel in respect of this issue. While this protocol is very persuasive, I have concluded from my reading that I am not absolutely bound based on comity to defer jurisdiction to Florida Court.

[88] The overwhelming consideration is that I have formed the strong view that Nova Scotia is by far the more convenient forum for this family. They are fundamentally a Canadian family and a Nova Scotia family. They found themselves in Florida for what was never intended to be a lengthy period and in part for the purpose of the parties enjoying a "getaway" to work on their marriage difficulties. The employment opportunity made available by a company in which the Petitioner had a significant interest was done at least in part for the purpose of facilitating that sojourn. This Nova Scotia family deserves to have its marital issues resolved in the Nova Scotia Court applying Nova Scotia substantive law. Largely for that reason, I must not permit the fact of the acceptance of jurisdiction by the Florida Court to interfere with a legal process that deserves to be in Nova Scotia.

[89] Also I am cognizant of the fact that, if I reject jurisdiction because of the Florida Court had already assumed jurisdiction, I would be allowing the Respondent's adjournment request to operate to her own strategic advantage and to the Petitioner's wholesale disadvantage despite his deference to the Respondent's dire need for that adjournment.

[90] Accordingly, all the matters between the parties brought to this Court shall be heard in this Court.

[91] If a party decides to continue this duplicity of proceedings in the two courts and if there is conflict between the content of the orders in those jurisdiction, those problems will have to be solved in some manner. If there are income tax problems because spousal support and child support may have opposite implications in the two countries from competing orders issued there respectively, then there will be one more problem to be solved. However, the parties must live with their respective decisions to proceed in parallel forums. Those decisions must not be allowed to oust the clear jurisdiction of this Court to determine the issues.

[92] If either party wishes to be heard on the question of costs in this proceeding, counsel for that party shall approach the Scheduling Office of this Court not later than thirty days from the date of this decision for the purpose of arranging one hour on my docket for a date convenient to both counsel and the Court to do so. On reflection, I prefer that approach to written submissions on costs.

CAMPBELL, J.