


Family Law News

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Divorce Proceeding with a side of Corollary Relief

Recently, at the Superior Court of Justice Family Court Division in Hamilton there was an interesting jurisdictional issue before one of our local judges Madame Justice Chappel. ***Bridgeman v. Balfour***, [2012] O.J. No. 5535, dealt with whether or not the court in Hamilton was the proper jurisdiction to hear two motions brought to change a final order when the child of the marriage no longer resides in the jurisdiction.

The parties of this dispute were married on September 15, 2002. They have one child of their marriage, namely Isaiah Eddison Balfour, born May 12, 2003. The parties separated in 2004 and the Applicant, Roseanne Bridgeman, commenced divorce proceedings in the Hamilton Family Court wherein she sought both a divorce, as well as, corollary relief. On February 16, 2006, a final order was made granting the Applicant sole custody of the child and giving the Respondent, Eddison Balfour, access rights to the child. The order stipulated that the Applicant's request for divorce would proceed on an uncontested basis once the one year time period had elapsed. The order for divorce was granted in June, 2006.

On December 9, 2008, the Applicant commenced a motion to change the February 16, 2006 final order to permit her to relocate to Florida with the child. On August 21, 2009, the Applicant was granted her request to relocate with the child to Florida. The Respondent's access was varied to take into account the change in the child's residential situation.

Since the Order of August 21, 2009, when the Applicant mother and child were permitted to relocate to Florida, there have been numerous proceedings brought in the Hamilton Family Court by the Respondent. The Respondent initiated an *ex parte* motion seeking to enforce his access rights. This motion was ultimately dismissed as it should not have been brought on an *ex parte* basis. Subsequently, the Respondent brought a contempt motion against the Applicant that was dismissed but the judge held that the issue of makeup access could be addressed in a later motion. The Respondent commenced a subsequent motion requesting makeup access for time he missed in 2010 and he was successful is securing 12 days of time with the child. He brought a further motion to change on April 6, 2011 requesting changes to the August 21, 2009 order including a number of terms relating to the location of access exchanges and other specifics regarding access. The Respondent also brought a second further motion to change requesting makeup visits for Christmas access that he indicated he had been denied in 2011.

The two most recent motion to change proceedings remain undecided and before Justice Chappel was the issue of whether Ontario was the proper jurisdiction to hear the motions. The Applicant argued that these motions should have been brought in Florida rather than Ontario. And of course to complicate matters further, the Respondent had moved to Burlington since the commencement of these motions and the issue was raised as to whether the motions should have been heard in Halton rather than Hamilton.

The Applicant relied upon sections 22 and 23 of the *Children's Law Reform Act (CLRA)* in support of her position that the motions were not brought in the proper jurisdiction. This legislation indicates that a court shall only exercise its jurisdiction to make an order for custody or access where the child is *inter alia* habitually

resident in Ontario. In a somewhat procedurally intricate decision, Justice Chappel concluded that the applicable legislation was in fact not the *CLRA* but rather that the *Divorce Act* and more specifically that section 5 of the *Divorce Act* applied.

> "The Parliament of Canada has been granted the power to deal with divorce pursuant to section 91(26) of the *Constitution Act*, 1867. This power allows Parliament to legislate respecting the issues of custody and access when these matters are raised in the context of divorce." articulates Justice Chappel at paragraph 9 of the decision.

Justice Chappel determined that the final Order of February 16, 2006 was not made pursuant to the *CLRA* but rather s. 16 of the *Divorce Act* as a paragraph of that final Order contemplated obtaining a divorce on an uncontested basis at a later date. The fact that the Order was made prior to the granting of the divorce did not alter the fact that the Order was made pursuant to the *Divorce Act*.

Justice Chappel indicates it is significant that s.16 the *Divorce Act* provides that a court may make an order respecting custody of or access to a child on application by either or both "spouses". The legislation does not refer to "former spouses" as in section 17 dealing with variation proceedings or in section 4 dealing with jurisdiction in separate corollary relief proceedings. She determines that the use of the term "spouse" alone reflected an intention that custody and access orders can be made pursuant to the *Divorce Act* in the context of a divorce proceeding prior the divorce being made, provided that a divorce is in fact subsequently granted.

She advances that this conclusion is further supported by Section 27 of the *CLRA* which provides that when divorce proceedings are commenced, any claims concerning custody and access under the *CLRA* that have not been determined are stayed by leave of the court. She then concludes that since the issues of custody and access were dealt with pursuant to the *Divorce Act*, changes to the existing orders must be addressed by means of variation proceedings brought pursuant to section 17 of the *Divorce Act*.

Under the *Divorce Act*, the governing consideration is not the residence of the child but rather whether either former spouse is ordinarily resident in the province at the time, or alternatively if both former spouses accept the jurisdiction of the court. Justice Chappel had no issue finding that the Respondent was resident in Ontario when the proceedings were commenced.

Justice Chappel refers to Rule 5 of the *Family Law Rules* which stipulates where a case is to be started. When children are involved, cases are typically started in the municipality where the child resides pursuant to the Provincial Family Law Rules. In paragraph 14 of her decision, Justice Chappel indicates,

> "While section 25 (2) of the Divorce Act allows competent authorities authorized by the province to make rules regulating the practice and procedure that apply to proceedings under the *Divorce Act*, those rules cannot override clear provisions in the *Divorce Act* addressing the same issues. In my view,

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> section 5 of the *Divorce Act* sets out clear directions regarding jurisdiction based on the residence of one of the parties."

Once Justice Chappel found that the Respondent met the test for commencing the proceedings in Ontario pursuant to section 5 of the *Divorce Act*, she then turns to the issue of which municipality is the appropriate region to proceed with the claims. Rule 5(8) of the Family Law Rules stipulates that a court may on motion transfer a case or any step in a case to another municipality if it is substantially more convenient to deal with the matter in another municipality. There was no motion before the court to transfer the proceeding and she was not satisfied that it would have been substantially more convenient to deal with the Motion in the Halton region as all of the proceedings to date were commenced in the Hamilton court. A transfer would have caused further delay and there was no suggestion that any relevant witnesses were from the Halton region.

Near the end of her decision, Justice Chappel, then considers whether the jurisdiction is negated by the fact that the Applicant resided outside of the jurisdiction at the time when the Respondent commenced these proceedings. She applies the real and substantial connection test from *Morguard* and considers the *Muscutt* Factors in her analysis. She is satisfied that the parties have a real and substantial connection with Ontario as both parties lived in Ontario until 2009, and the parties have litigated all matters arising out of the existing orders in Ontario, the Respondent continues to live in Ontario and has visitation rights with the child in Ontario. She also mentions that since the Respondent did not consent to the child's relocation, it would have been an unfair burden on him in his efforts to pursue his rights in relation to the child.

While interesting from a technical standpoint, this decision poses a number of problems for litigants with similar problems to be solved by a court but having different litigation histories. First of all, if the Applicant had not obtained the divorce, the first Order would not have been made pursuant to the *Divorce Act.* As a result, the *CLRA* would have applied with the likely result that the Respondent would not have been able to bring his motions to change in Ontario as Florida would have been the proper jurisdiction. This is somewhat of an intellectual quandary as unmarried or never divorced spouses lose the ability to litigate this type of issue where the original proceedings were commenced merely because they cannot fall under the purview of the *Divorce Act*.

It is also somewhat unsavoury that because the parties litigated all matters arising out of the Order of August 21, 2009 in Ontario this became part of the consideration in finding a real and substantial connection to Hamilton. The Respondent is almost rewarded for his frequent flyer litigation status when in fact litigation should be discouraged, especially with two motions that were dismissed both on substance. If the Respondent had never litigated these issues, the scales may have tipped the other way and the court may have found that there was no real and substantial connection to Ontario. This also doesn't fair either to someone who may have chosen not to litigate but is now excluded from a real and substantial connection to Ontario.

In any event, this case is interesting to consider when advising a client on where a motion to change may be commenced when dealing with custody and access issues. Counsel should consider if the motion to change can be brought in the jurisdiction closest to the client even if the subject children have since moved from the jurisdiction. This case also severs as a good reminder to carefully read the applicable or potentially applicable legislation prior to commencing proceedings. ■

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