2012 ONSC 6628
Ontario Superior Court of Justice

Gyuzeleva v. Angelov

2012 CarswellOnt 14936, 2012 ONSC 6628, [2013] W.D.F.L. 1708, [2013] W.D.F.L. 1710, 223 A.C.W.S. (3d) 828

Tsvetelina Gyuzeleva, Applicant and Emil Angelov, Respondent

J. Mackinnon J.

Heard: November 15, 2012
Judgment: November 22, 2012
Docket: Ottawa FC-12-1893

Proceedings: additional reasons at *Gyuzeleva v. Angelov* (2012), 2012 ONSC 7193, 2012 CarswellOnt 16101 (Ont. S.C.J.)

Counsel: Jack E. Pantalone, for Applicant
Casper van Baal, for Respondent

Subject: International; Family

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Conflict of laws

III Family law
III.4 Divorce
III.4.a Jurisdiction

Conflict of laws

III Family law
III.6 Children
III.6.d Custody
III.6.d.vi Miscellaneous

Headnote

Conflict of laws --- Family law — Divorce — Jurisdiction

Bulgarian couple with one child moved to Canada in 2006, but after they separated in 2012, father moved back to Bulgaria while wife and child remained in Ontario — Father brought action in Bulgaria for divorce, custody and access, and mother brought similar action in Ontario — Father brought motion to stay or dismiss action on grounds that he had commenced similar proceeding in Bulgaria and it was more appropriate forum — Motion dismissed — Ontario clearly had jurisdiction over all issues raised in application, and fact that proceedings were commenced in Bulgaria first was only one factor to consider — Ontario had jurisdiction related to child's custody and access, and while possibly both Bulgaria and Ontario courts had jurisdiction to entertain divorce, Ontario was more appropriate forum — Parties resided in Ontario for most recent six years, and child still resided in Ontario where he went to school, had friends, received medical attention and engaged in activities — Ontario was jurisdiction in which most recent evidence connected to child's best interests was located — Custody and access were most important issues and should be litigated in Ontario — Ontario was parties' last jurisdiction of common residence, and location of family home — There was also potential juridical disadvantage to mother if divorce was granted in Bulgaria, as it would bar her from seeking spousal support in Ontario — Father was able to travel back and forth

from Bulgaria to Ontario while mother recently obtained minimum wage employment and could not afford to travel to Bulgaria to pursue claims.

Conflict of laws --- Family law — Children — Custody — Miscellaneous issues

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Table of Authorities

Cases considered by *J. Mackinnon J.*:

Huber v. Huber (1999), 1999 CarswellOnt 3776, 81 O.T.C. 31 (Ont. S.C.J.) — followed

Jenkins v. Jenkins (2000), 8 R.F.L. (5th) 96, 2000 CarswellOnt 1583 (Ont. S.C.J.) — followed

Rothgiesser v. Rothgiesser (2000), 2000 CarswellOnt 50, 183 D.L.R. (4th) 310, 2 R.F.L. (5th) 266, 128 O.A.C. 302, 46 O.R. (3d) 577 (Ont. C.A.) — considered

Van Breda v. Village Resorts Ltd. (2012), 17 C.P.C. (7th) 223, 2012 SCC 17, 2012 CarswellOnt 4268, 2012 CarswellOnt 4269, 91 C.C.L.T. (3d) 1, 343 D.L.R. (4th) 577, 429 N.R. 217, 10 R.F.L. (7th) 1, 291 O.A.C. 201, *(*sub nom. *Club Resorts Ltd. v. Van Breda)* [2012] 1 S.C.R. 572 (S.C.C.) — considered

Statutes considered:

Children's Law Reform Act, R.S.O. 1990, c. C.12
Generally — referred to

s. 22(1)(a) — considered

s. 22(2) — considered

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)
Generally — referred to

s. 3(1) — considered

s. 3(2) — considered

s. 4 — considered

MOTION by father to stay or dismiss mother's action in Ontario on grounds that he had commenced similar proceeding in Bulgaria and it was more appropriate forum.

***J. Mackinnon J.*:**

1 This motion is brought by the respondent for an order to stay or dismiss the case on the grounds that he had already commenced a similar proceeding in Bulgaria. The respondent submits that the Ontario court does not have jurisdiction, or, in the alternative it should decline to exercise jurisdiction on the basis that Bulgaria is the more convenient forum.

2 The relevant facts can be briefly stated. The parties were born in Bulgaria and are Bulgarian citizens. They were married in Bulgaria in 1997. They own an apartment there. They have one child who was born in Bulgaria and has Bulgarian citizenship. After he was born the parties began discussing the idea of moving to Canada to provide a better future for him. The family moved here in August 2006. A condominium was purchased in the applicant's name. The family resided in it until the date of separation, July 6, 2012. Thereafter, the respondent returned to Bulgaria. On July 24, 2012 he filed in Bulgaria for divorce, custody and access. The applicant filed in Ontario for divorce, custody, access and a restraining order, on July 31, 2012. Both actions have been defended. No property claims have been made in the Ontario action. The respondent husband has asked for an award of the use of the Ottawa condominium from the court in Bulgaria.

3 On October 4, 2012 the applicant brought a motion in Bulgaria asking that court to terminate its proceeding. This was denied, apparently on the basis of insufficiency of evidence. The next court date scheduled in Bulgaria is November 27, 2012.

4 The child of the marriage has continued to reside in Ontario with the applicant since the parties' separation. Both are landed residents.

Jurisdiction of Ontario Court

5 In my view Ontario clearly has jurisdiction over all of the issues raised in the Application before it. The Application is commenced under both the *Divorce Act* and the *Children's Law Reform Act* ("*CLRA*"). Section 3(1) and (2) of the *Divorce Act* provide:

> 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. Jurisdiction where two proceedings commenced on different days
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> (2) Where divorce proceedings between the same spouses are pending in two courts that would otherwise have jurisdiction under subsection (1) and were commenced on different days and the proceeding that was commenced first is not discontinued within thirty days after it was commenced, the court in which a divorce proceeding was commenced first has exclusive jurisdiction to hear and determine any divorce proceeding then pending between the spouses and the second divorce proceeding shall be deemed to be discontinued.

6 The respondent maintains that on the facts of this case, section 3(2) has the effect of placing jurisdiction in the Bulgarian court because that proceeding was commenced first. I disagree. The reference in subsection 2 is to courts with jurisdiction under subsection 1, and that clearly refers to courts in a "province". "Court" in respect of a province is also a defined term in the *Divorce Act* and refers to the superior court of each province by name. If more authority is required, I refer to the Ontario Court of Appeal decision in *Rothgiesser v. Rothgiesser* (2000), 46 O.R. (3d) 577 (Ont. C.A.), where the court said in reference to the prior version of section 4 of the *Divorce Act* at para. 28, and in reference to the current version at 59:

28 ... Thus, a court will have jurisdiction to hear and determine a corollary relief proceeding, and can therefore make a support order, provided it is the court that has also granted either or both parties their divorce. Clearly, the 'court' can only be a Canadian court and would include the Ontario Court where it was the court that granted the parties their divorce.

. . . . .

59 In my view, the amendment did no such thing. Whereas Parliament had previously limited jurisdiction to the court that had granted the divorce, the amendment extended the jurisdiction by authorizing a Canadian court to hear a corollary relief proceeding if either spouse were ordinarily resident in the province or if both former spouses accepted the jurisdiction of the court. ...

7 Section 22(1)(a) and (2) of the *CLRA* provide as follows:

Jurisdiction

22. (1) A court shall only exercise its jurisdiction to make an order for custody of or access to a child where,

(a) the child is habitually resident in Ontario at the commencement of the application for the order; ...

Habitual residence

(2) A child is habitually resident in the place where he or she resided,

(a) with both parents;

(b) where the parents are living separate and apart, with one parent under a separation agreement or with the consent, implied consent or acquiescence of the other or under a court order; or ...

8 There is no question but that Ontario has jurisdiction over the issues related to this child's custody and access.

Forum Non Conveniens

9 The Supreme Court of Canada has recently addressed the concept of *forum non conveniens* in *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17, [2012] 1 S.C.R. 572 (S.C.C.). That case required the issue of jurisdiction to be dealt with according to common law. The cause of action was in tort committed outside Canada. The Supreme Court stated at paras. 101 - 103, 108, 109 and 110:

(9) Doctrine of Forum Non Conveniens and the Exercise of Jurisdiction

101 As I mentioned above, 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.

. . . . .

108 Regarding the burden imposed on a party asking for a stay on the basis of forum non conveniens, the courts have held that the party must show that the alternative forum is clearly more appropriate. The expression "clearly more appropriate" is well established. ...

109 The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. ...

110 As I mentioned above, the factors that a court may consider in deciding whether to apply *forum non conveniens* may vary depending on the context and might include the locations of parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of the connections of the two parties.

10 The respondent submits that the Bulgarian court is likely to proceed to grant a divorce at the next scheduled hearing date. He says that this should lead this Ontario court to decline its own jurisdiction to hear the applicant's divorce application. Were this to occur the applicant may be faced with a situation similar to that arising in *Huber v. Huber*, [1999] O.J. No. 4400 (Ont. S.C.J.) where there were parallel proceedings in Germany and Ontario and the German court was first to issue a divorce. The Ontario court had to decide whether to recognize the German divorce, and if it did, the impact of so doing on the remaining issues in the Ontario case. The court stated at paras. 18 and 19:

18 Does the validity of the divorce necessarily mean that Germany is the right place for the adjudication of the other matters arising from the marriage and the separation of the parties? I observe first that the test for recognition of foreign divorces is not the same as the test for deciding which of two active family law cases should proceed. In the case of a divorce already granted, there are strong public policy reasons for a fairly broad recognition standard, as it is highly undesirable that a couple should be considered divorced in one country but still married in another, and all the more if one of the parties remarries. Different considerations apply in determining whether one country or another should carry on with a pending case dealing with custody, support and matrimonial property.

19 As a purely technical matter, I note that the father's 1999 application to this court invoked, in the alternative, both the Divorce Act (Canada) and the provincial Children's Law Reform Act and Family Law Act in asking for custody of and support for the children. The issue of divorce is now moot, as I have found that the German divorce is valid. If the divorce claim falls, so must necessarily the custody and support claims under the federal legislation: federal jurisdiction over these issues arises only where "incidental" to a divorce. See *Zacks v. Zacks* (1973), 10 R.F.L. 53 (S.C.C.). However, the father has invoked provincial custody and support law and he therefore has a claim that is still alive.

11 I agree with this analysis. It may be that both the Bulgarian and Ontario courts have jurisdiction to entertain the issue of divorce. It may also be that despite the respondent's expectation and the pending court date in Bulgaria, that court may decline to exercise jurisdiction on receipt of these reasons and the decision of this Court. I say this because, in my view, Ontario is by far the more appropriate forum to deal with all the issues between these parties. This is the jurisdiction in which the parties have resided for the most recent six years. This is where the child resides, has gone to school, made friends, received his medical care and engaged in after school activities. The potential witnesses in relation to these aspects of his life are in Ontario. It is the jurisdiction in which the most recent evidence connected to the best interests of the child is located. In his affidavit filed in the Ontario court, the respondent father states that he will come back to Canada as soon as he is allowed to see his son. In his application in Bulgaria, he also alludes to this intention because he asks that court to award him use of the family home in Ottawa for himself and his son. The child's custody and access to his parents is the most important issue between these parties. It is most appropriately litigated in Ontario.

12 Ontario is also the parties' last jurisdiction of common residence. This is the only court with jurisdiction over the family home located here. There is property owned by the respondent in Bulgaria but no claim has been made in relation to it.

13 In *Jenkins v. Jenkins* (2000), 8 R.F.L. (5th) 96, [2000] O.J. No. 1631 (Ont. S.C.J.) the court stated at para. 29:

> 29 Does it matter whether the English court will or might proceed to grant a divorce? I think it is immaterial. I had a somewhat similar issue to deal with in *Huber v. Huber*, [1999] O.J. No. 4400 (S.C.J. Fam. Ct.), and there I found that since the foreign divorce would be recognized here and since the applicant's claims were made under provincial law as well as federal (and were thus not dependent for their existence on a pending divorce case in Ontario), there was no inconvenience to continuing the Ontario case without the divorce. Of course, in this case we do not know whether the English court will proceed to grant the divorce if this court decides to retain jurisdiction, but if it does, the mother's other claims are all made independently of the divorce.

14 These words are equally applicable here.

15 The other factor that leads to my conclusion is the potential juridical disadvantage to the applicant if a divorce is granted in Bulgaria. This would bar her from ever seeking spousal support in her own place of residence, namely Ontario. The record before me shows that the respondent is better able to travel between the two countries. He appears to have done so on a fairly regular basis in the past. The applicant has only recently obtained employment as a retail clerk at the minimum wage and she can ill afford to travel to Bulgaria to pursue claims there.

16 The fact that the respondent was first to launch his application is only one factor and, in my view, it does not come even close to matching the strong reasons favouring Ontario as the most appropriate forum to deal with the child related issues.

17 The respondent submitted that the onus was on the applicant to satisfy this Court that Ontario is the more appropriate forum. I disagree. This Court's jurisdiction arises from the statutory provisions set out earlier in these reasons. This is not a case such as *Van Breda*, where the plaintiffs were required to establish jurisdiction by application of common law principles. *Van Breda* is authority for the principle that once jurisdiction is established, it is up to the opposing party to persuade the court that the other jurisdiction is clearly more appropriate. The respondent has not met this onus.

Decision

18 The respondent's motion to dismiss or stay these Ontario proceedings is dismissed with costs to the applicant. If counsel are unable to agree on the amount of costs, they may make brief written submissions to me in accordance with a timetable to be agreed upon between them, but not to extend past December 14, 2012.

Motion dismissed.