Focus FAMILY LAW

Homing in on residency requirements

Oren Weinberg

Family lawyers are seeing an increasing number of cases in which one party challenges the court's ability to determine a case on the basis that it lacks jurisdiction. This is not surprising given that people are increasingly mobile and relocate for work or other reasons. A separated spouse may have returned to Ontario and wants to retain you to start a proceeding against their former spouse. Similarly, a spouse who remains abroad may wish to retain you to defend claims brought against them in Ontario. You need to understand when Ontario can assume jurisdiction.

The analysis is not intuitive. People may have been resident or domiciled in Ontario. People may own property in Ontario. They may have strong family connections in Ontario. But that does not necessarily mean that Ontario is the proper jurisdiction to resolve their family law disputes. Proceedings under the *Children's Law Reform Act*, the *Divorce Act*, and the *Family Law Act* each trigger different tests.

The threshold test under the s. 3 of the *Divorce Act* is "ordinary residence." The claimant must demonstrate that they were ordinarily resident in the province for at least one year immediately preceding the start of the application. At the same time, a party has no standing to claim support under the *Divorce Act* if a divorce has already been granted in another jurisdiction (see *Stefanou v Stefanou* [2012] O.J. No. 6163).

Under the *Children's Law Reform Act*, the court will assume jurisdiction if the child is habitually resident in Ontario. Habitual residence is defined under ss. 22(1) and (2) of the act and means: a) the place where he or she resided with both parents; b) where the parents are living separately, with one parent pursuant to a separation agreement or with the consent of the other parent; or c) with someone other than a parent on a permanent basis for a significant period of time.

If an applicant cannot establish that the child is habitually resident in Ontario, in order for the court to take jurisdiction the following must be established:

1. The child is in Ontario at the start of the application.
2. Substantial evidence concerning the children's best interest is in Ontario.

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3. No other application for custody or access is pending before another court in a jurisdiction in which the child is habitually resident.
4. No other order for custody or access has been recognized by another court.
5. The child has a real and substantial connection to Ontario.
6. On balance, it is more appropriate for Ontario to exercise jurisdiction.

Property and support claims under the *Family Law Act* are dealt with differently. The act is silent on the question of jurisdiction. Jurisdiction must be determined in accordance with the principles established at common law, particularly, the "real and substantial connection test" recently clarified by the Supreme Court of Canada in *Club Resorts Ltd. v. Van Breda* [2012] S.C.J. No. 17. This case is the road map for jurisdiction cases. Traditional grounds upon which a court may take jurisdiction, such as a party's submission to the jurisdiction by agreement, attornment or presence in the jurisdiction, are not ousted by the test in *Van Breda*. If the applicant cannot show the respondent to have submitted to this jurisdiction then the applicant must connect the litigation to Ontario by demonstrating that one or more of the following presumptive factors applies:

1. The defendant is domiciled or resident in the province;

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environment produced coercion such that the settlement was not truly consensual: see, for example, *Seguin v. Chaput* [2010] O.J. No. 767, and *Lougheed v. Ponomareva* [2013] O.J. No. 2952.

Another argument often heard from parties challenging a settlement is "I didn't realize it was final." A lack of understanding of the implications of contracts — and perhaps an erroneous expectation that the resolution of family law issues requires certain formalities ("doesn't a judge have to approve it?") — can lead a party to believe that a mediated settlement isn't *really* binding. A cooling-off period provides counsel with an opportunity to further explain the legal effect and implications of the agreement to the client *before* he or she is bound.

Equally important, Bernstein says, is that a cooling-off period provides an important opportunity to catch — and rectify — omissions and minor drafting deficiencies. Sometimes, the compressed time frame of mediation means that a party or his or her counsel may forget to address an issue. "The lawyer and the client may have a different understanding of the importance of a particular issue. For example, the lawyer may be pleased that settlement has been achieved, but the next day the client may come back and say, 'but you didn't get me the snowblower! It's not in the agreement!' It can be frustrating to the lawyer to have a client unhappy with a settlement over what, to the lawyer, seems like an insignificant detail. But if there's a cooling-off period, there's an opportunity to make a change that will satisfy the client." Also, since a mediation table is not an optimum place to draft a contract, lawyers may accidentally omit provisions the absence of which can threaten the clarity or future enforceability of the settlement. Having an opportunity to proofread the agreement and to compare it to checklists or precedents can prevent problems down the road.

Finally, cooling-off periods have the potential to reduce claims against lawyers related to all of the above issues: lack of consent, lack of understanding of settlement implications, and drafting snafus.

As for disadvantages, says Bernstein, "I don't see *any* downside." While it would be expected that the widespread use of cooling-off periods might result in the repudiation of a greater number of draft settlements, the settlements affected would likely be those most vulnerable to eventual challenge anyway. And any exacerbation of time pressures that a cooling-off period might cause could easily be avoided by building extra time into the mediation schedule.

There is no easy way to determine to what extent Canadian mediators and family lawyers are already using cooling-off periods, but the advantages suggest that it's a practice that deserves a higher profile.

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Domicile: Van Breda case is the road map

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2. The defendant carries on business in the province;
3. The tort was committed within the province;
4. A contract connecting the dispute was made within the province.

While *Van Breda* was a tort case, the court made it clear that the presumptive factors were not exhaustive. Identifying new presumptive factors should be done having consideration for similarities between the new factor and the already recognized presumptive factors, and the treatment of the new factor in the case law, statute law, and private international law of legal systems that share a commitment to order, fairness and comity.

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In *Wang v. Lin* [2013] O.J. No. 254, the Court of Appeal for Ontario endorsed a new presumptive factor relevant to family law cases. The court was of the view that the parties' real home or ordinary residence should be a presumptive factor for proceedings under the *Family Law Act*. Justice Alexandra Hoy stated that "it made eminently good sense" that the real home should be a presumptive factor, given ordinary residence and habitual residence are the jurisdictional tests under the *Divorce Act* and the *Children's Law Reform Act*.

Once a presumptive factor is established, jurisdiction is assumed. The party contesting jurisdiction may then invoke the doctrine of *forum non conveniens* and ask the court to decline to assume jurisdiction on the basis that the foreign jurisdiction is more convenient. *Van Breda* sets out a list of non-exhaustive factors that may be considered in deciding to decline jurisdiction:

1. The location of the parties and witnesses;
2. The cost of transferring the case to another jurisdiction or of declining the stay;
3. The impact of a transfer on the conduct of the litigation or on related or parallel proceedings;
4. The possibility of competing judgments;
5. Problems related to the recognition and enforcement of judgments;
6. The relative strengths of the connections of the two parties.

The next time a client arrives at your office and tells you that they just separated from their spouse who remains in another jurisdiction, turn your mind to the issue of jurisdiction before starting your application. Consider whether you can persuade the court to assume jurisdiction, and also how you will defend a claim if Ontario does not have jurisdiction.

Oren Weinberg is a partner at Basman Smith and practises exclusively in family law.

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