When will an Ontario court assume jurisdiction in Family Law Cases

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 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 CarswellOnt 16518.

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 then 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,
3. that no other application for custody or access is pending before another court in a jurisdiction that the child is habitually resident,
4. that no other order for custody or access has been recognized by another court
5. that the child has a real and substantial connection to Ontario, and
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 SCC 17 (*Van Breda*). The 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:

1. the defendant is domiciled or resident in the province;
2. the defendant carries on business in the province;
3. the tort was committed in the province;
4. a contract connecting the dispute was made in 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, treatment of the new factor in the case law, statute law, and in the private international law of legal systems that share a commitment to order, fairness and comity.

The Ontario Court of Appeal in *Wang v. Lin,* 2013 ONCA 33 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 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. They are as follows:

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, and
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 how you will defend a claim that Ontario does not have jurisdiction.