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Recognizing Foreign Divorces: The Public Policy Defence

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Cases Considered:

Zhang v. Lin, 2010 ABQB 420

Zhang v. Lin raised the question of whether a divorce granted in Texas should be recognized in Alberta. Interestingly, the court determined that it should refuse recognition of the Texas decree because it violated Canadian public policy. In the past, such a defence has been seen as more of a theoretical than a real possibility. In *Zhang*, however, the court came to that conclusion very readily. What concerned the Alberta court was not so much the divorce itself but the apparent lack of corollary relief by way of child and spousal support available to the respondent in Texas.

Facts

The parties were married in China in 1986. They had one child who was born in 1988 and who had recently been accepted into the Faculty of Medicine at the University of Alberta. They had lived in Alberta for about 14 years when, on February 17, 2008, the husband, Mr. Lin, left his engineering job in Edmonton and moved to Texas for work. On August 7, 2008, the husband filed for divorce in Texas. In his application, he stated incorrectly that he had less than $50,000 in property. In September, the wife, Ms. Zhang, applied for divorce in Alberta. In October, Lin filed a statement of defence to his wife's Alberta petition in which he agreed, among other things, to pay some support for his son until he finished his university education and to delay the sale of the matrimonial home as support for his wife. It appeared that Zhang's lawyer had a discussion with the judge who was handling the Texas divorce in which the lawyer claimed that Alberta was the proper forum to deal with the divorce and corollary relief. The lawyer also argued that the Texas court lacked jurisdiction to deal with the husband's petition because Texas law required that, prior to commencing divorce proceedings, the petitioner must have been resident in the state for at least six months and Lin had been some ten days short of that mark.

Despite this intervention by the wife's lawyer, Lin apparently obtained a divorce decree from the Texas court on January 21, 2009. As proof, Lin supplied a certified copy of what the judge described as a clerk's handwritten notes which, to some degree, were undecipherable. The Texas decree purported to make a division of the couple's matrimonial property, including the matrimonial home in Edmonton, but it did not require the husband to pay either child support or spousal support. In November 2009, the husband filed a new defence to the Alberta proceedings in which he asked the court to take account of the Texas order. By that time, Lin had left Texas and was currently living in Virginia.

In the present application, Zhang sought a declaration that the Texas divorce was not recognized in Canada. If successful in that application, she asked the court for an order for both child

support and spousal support. The primary question, therefore, was whether the Texas divorce would be recognized in Canada. Lin was unrepresented throughout the Alberta proceedings which perhaps explains the general inadequacy of the record and the lack of any clear proof of various matters, including the Texas divorce itself.

Jurisdiction of Texas Court

When a Canadian court is called upon to recognize a foreign decree of divorce, the basic issue to be determined is whether the foreign court is regarded by the Canadian court as having had jurisdiction to dissolve the marriage in question. Two bases for jurisdiction are set out in section 22 of the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3:

> (1) A divorce granted, on or after the coming into force of this Act, pursuant to a law of a country or subdivision of a country other than Canada by a tribunal or other authority having jurisdiction to do so shall be recognized for all purposes of determining the marital status in Canada of any person, if either former spouse was ordinarily resident in that country or subdivision for at least one year immediately preceding the commencement of proceedings for the divorce.
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> (2) A divorce granted, after July 1, 1968, pursuant to a law of a country or subdivision of a country other than Canada by a tribunal or other authority having jurisdiction to do so, on the basis of the domicile of the wife in that country or subdivision determined as if she were unmarried and, if she was a minor, as if she had attained the age of majority, shall be recognized for all purposes of determining the marital status in Canada of any person.

As Madam Justice J.B. Veit observed in *Zhang*, neither of these grounds applied given that Zhang had no connection to Texas and Lin had lived there for slightly less than 6 months prior to the commencement of his petition. Section 22(3) of the *Divorce Act*, however, preserves the common law bases for a foreign court's jurisdiction over divorce. These rules were nicely summarized by the Nova Scotia Court of Appeal in *Orabi v. El Qaoud*, 2005 NSCA 28, when it adopted (at para. 14) the following extract from Julien D. Payne, *Payne on Divorce* (4th ed. 1996), at 111:

> Canadian courts will recognize a foreign divorce: (i) where jurisdiction was assumed on the basis of the domicile of the spouses; (ii) where the foreign divorce, though granted on a non-domiciliary jurisdictional basis, is recognized by the law of the domicile of the parties; (iii) where the foreign jurisdictional rule corresponds to the Canadian jurisdictional rule in divorce proceedings; (iv) where the circumstances in the foreign jurisdiction would have conferred jurisdiction on a Canadian court had they occurred in Canada; (v) where either the petitioner or respondent had a real and substantial connection with the foreign jurisdiction wherein the divorce was granted; and (vi) where the foreign divorce is recognized in another foreign jurisdiction with which the petitioner or respondent has a real and substantial connection.

Justice Veit (at para. 47) borrowed the same summary of legal principles from *Orabi*. She concluded that the Texas court had jurisdiction on the ground that Lin had a real and substantial connection with Texas at the time of the commencement of the divorce proceedings. He "had chosen to move to that state, to live there, and to become employed there" (para. 60). It is interesting to note that, in applying the real and substantial connection test, Justice Veit relied upon two cases from the New Brunswick Court of Appeal which were interpreting the Supreme Court's landmark decision on *in personam* jurisdiction in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077. In fact, the real and substantial connection test in matrimonial matters pre-dates *Morguard* by more than 20 years, having first been established by the House of Lords in *Indyka v. Indyka*, [1969] 1 A.C. 33 (H.L.). Indeed the Supreme Court in *Morguard* used the approach taken in *Indyka* as part of the foundation of its new doctrine of *in personam* jurisdiction (*Morguard* at p. 1104). It is perhaps surprising that Justice Veit, in applying the real and substantial connection test, neglected to refer to any authority, of which there is now a long line, from the matrimonial context.

The myriad of bases, both statutory and common law, for the recognition of a foreign court's divorce jurisdiction illustrates the generosity of Canadian courts when it comes to the recognition of foreign divorces. Certainly, the jurisdiction of Canadian courts is much more restrictive because it is limited to cases where either spouse has been ordinarily resident in the province in which proceedings are commenced for at least one year immediately preceding the presentation of the petition (*Divorce Act*, s. 3(1)). *Zhang* itself illustrates the point well. Texas was regarded as having jurisdiction to grant the divorce even though the petitioner had been resident in that state for only about six months and the respondent had absolutely no connection with Texas. Similarly, in the earlier case of *Wlodarczyk v. Spriggs* (2000), 200 Sask. R. 129 (Q.B.) a Saskatchewan court recognized an Australian divorce based on *Indyka* despite the fact that the husband had lived with his wife in Saskatchewan for some 17 years and had resided in Australia for only four months prior to commencing divorce proceedings. The court concluded that Australia had a real and substantial connection with the husband. He was an Australian citizen, had lived previously in Australia for 15 years and had married in Australia, and, after the matrimonial breakdown, had moved back to Australia and taken up employment there.

Defences to the Recognition of Foreign Divorce Decrees

Canadian courts do not generally concern themselves with the merits of foreign divorce decrees. Where a foreign court of competent jurisdiction has granted a divorce decree, then that decree is in general conclusive on the merits. Canadian "standards and divorce principles are irrelevant if the foreign court had jurisdiction to deal with the matter" (*Dashtarai v. Shahrestani*, [2006] O.J. No. 5367, at para. 24 (S.C.J.)). While there are certain defences, they "are, properly, few in number" (*Powell v. Cockburn*, [1977] 1 S.C.R. 218, at 234) and narrow in scope. In *Orabi*, at para. 17, Justice Fichaud summarized the available defences by adopting a passage from what is now Janet Walker, *Castel & Walker: Canadian Conflict of Laws* (6th ed. 2005) (looseleaf), at para. 17.2.c:

> Although the foreign court that granted the decree may be jurisdictionally competent in the eyes of Canadian law, recognition will be refused if the respondent did not receive notice of the proceeding, especially if fraud was present. The jurisdiction of the foreign court must not be established "through any flimsy residential means" and the petitioner must not have resorted to the foreign court for any fraudulent and improper reasons such as solely "for the purpose of

> obtaining a divorce." The foreign decree must not be contrary to Canadian public policy. Denial of natural justice may also be a reason for refusing recognition.

Justice Veit in *Zhang* (at para. 48) relied upon the same passage. There has been the odd case where a foreign divorce decree has been refused recognition on the ground of fraud. In *Powell v. Cockburn*, the Supreme Court refused to recognize a Michigan divorce on the ground of fraud. Justice Dickson drew a distinction between fraud relating to the jurisdiction of the foreign court and fraud relating to the underlying merits of the action. It was only fraud as to jurisdiction that offered a realistic defence. In *Zhang*, Justice Veit took pains to point out that Lin had not defrauded the Texas court as to its jurisdiction. While it was true that he had not in fact lived in Texas for the six months required by Texas law for jurisdiction, he had not misled the court about the length of his residence in Texas.

There have also been a few cases where a foreign divorce has been refused recognition because of a violation of natural justice: see for example *Orabi*. The refusal to recognize a foreign divorce decree on public policy grounds, however, is very rare indeed. The single common law authority cited in *Castel & Walker*, is *Joyce v. Joyce*, [1979] Fam. 93, a case based on the *Recognition of Divorces and Legal Separations Act 1971*, 1971, c. 53 (U.K.). Nevertheless, Justice Veit decided that the Texas divorce should not be recognized because it was contrary to Canadian public policy.

The court's objection to the Texas divorce related not to the divorce as such but to the question of support. In particular, by Texas law, it appeared that it was impossible even to make a claim for child support of an adult child. Equally, the Texas divorce did not require the husband to pay spousal support whereas, under Canadian law, the wife had established an entitlement to such support. Justice Veit (at para. 71) therefore concluded that "the clear differences in treatment of child and spousal support between Texas law and Canadian law justif[ied] Canada's non-recognition of [the] Texas divorce" in the circumstances of the case. In reaching that conclusion, she pointed out that, on the basis of *Rothgiesser v. Rothgiesser* (2000), 46 O.R. (3d) 577 (C.A.), Canadian courts had no jurisdiction under the *Divorce Act* to grant corollary relief in respect of a foreign divorce. The inference, therefore, was that recognition of the Texas decree would disentitle Zhang from claiming either child support or spousal support.

Although a refusal to recognize a foreign divorce on the grounds of public policy is exceptional, it makes sense that an important factor to take into account must be the financial consequences of the divorce upon the respondent. Before the court concluded, however, that the Texas decree was contrary to public policy, one would have expected greater analysis of the issue. First, there was no proof of the Texas law with respect to child support and spousal support. Secondly, the nature of Zhang's participation in the Texas proceedings was obscure at the very least. Thirdly, before deciding that the recognition of the Texas divorce was contrary to public policy because it would deprive Zhang of the opportunity to claim child and spousal support under Canada's *Divorce Act*, the court should have examined the availability of relief to Zhang pursuant to provincial legislation, such as the *Family Law Act*, S.A. 2003, c. F-4.5, and the *Interjurisdictional Support Orders Act*, S.A. 2002, c. I-3.5. Only then could a proper conclusion be reached as to the deleterious effects of the Texas divorce.