Mattar v. Elbarbary

Ontario Judgments

Ontario Superior Court of Justice

E.L. Nakonechny J.

Heard: May 30, 2019.

Judgment: June 7, 2019.

Court File No.: FS-18-006822

[2019] O.J. No. 5127 | 31 R.F.L. (8th) 242 | 2019 CarswellOnt 16470

RE: Lina Ahmad Mohamed Mattar, Applicant, and Magdi Mohamed Hafiz Elbarbary, Respondent

(68 paras.)

Case Summary

Family law — Custody, parenting, and access — Custody and parenting time — Access — Respondent's motion for summary judgment dismissing Applicant's claims for spousal support, child support, equalization of net family properties, and property relief granted in part — Respondent's position was that Ontario court did not have jurisdiction to hear corollary relief proceeding for child and spousal support — Applicant's position was that Ontario court should refuse to recognize validity of foreign divorce — Applicant met burden of showing substantial connection between Ontario and Applicant's claim for child support — Respondent's motion granted for all claims but dismissed with respect to claim for child support for child L.

Family law — Marital or family property — Equalization or division — Family property, what constitutes — Respondent's motion for summary judgment dismissing Applicant's claims for spousal support, child support, equalization of net family properties, and property relief granted in part — Respondent's position was that Ontario court did not have jurisdiction to hear corollary relief proceeding for child and spousal support — Applicant's position was that Ontario court should refuse to recognize validity of foreign divorce — Applicant met burden of showing substantial connection between Ontario and Applicant's claim for child support — Respondent's motion granted for all claims but dismissed with respect to claim for child support for child L.

Family law — Maintenance and support — Child support — Spousal support — Respondent's motion for summary judgment dismissing Applicant's claims for spousal support, child support, equalization of net family properties, and property relief granted in part — Respondent's position was that Ontario court did not have jurisdiction to hear corollary relief proceeding for child and spousal support — Applicant's position was that Ontario court should refuse to recognize validity of foreign divorce — Applicant met burden of showing substantial connection between Ontario and Applicant's claim for child support — Respondent's motion granted for all claims but dismissed with respect to claim for child support for child L.

Motion by Respondent for summary judgment dismissing Applicant's claims for spousal support, child support, equalization of net family properties and property relief. The Respondent argued that he properly obtained a divorce in Sudan in accordance with the Islamic law after the parties lived separately for at least seven years. The Applicant did not dispute that she was served with the divorce certificate in Sudan. They had three children: N, M and L. The Applicant stated that the date of separation was January 1, 2011. The Applicant and one child moved to Toronto.

The Respondent's counsel attended the court to argue the motions on his behalf but made clear that the Respondent was not attorning to the jurisdiction of Ontario until his motion for summary judgment had been heard and determined. The Respondent's position was that an Ontario court did not have jurisdiction to hear a corollary relief proceeding for child support and spousal support. He argued that an Ontario court could not adjudicate property rights when the parties' last common habitual residence was Sudan. He argued that Ontario should not presume jurisdiction over child support for a child over the age of majority who only resided in Ontario for a few months. The Applicant's position was that the Ontario court should refuse to recognize the validity of the foreign divorce on the ground that the Applicant did not have notice of the proceeding and that the foreign divorce was contrary to public policy. She argued that, even if the divorce was found to be valid, she was still entitled to make a claim for equalization and child support.
HELD: Motion granted in part.

Regarding applicant's claim for spousal support, the court did not have jurisdiction to hear and determine a corollary relief proceeding following a valid divorce in a foreign jurisdiction. The court found that the Applicant did not meet the burden of establishing that Ontario had a real and substantial connection to the equalization of net family properties and property claims made by her in the Application. The court did not have jurisdiction to determine claims for custody and access where a child was over the age of majority. It also found that the Applicant met the burden of showing there was a real and substantial connection between Ontario and the Applicant's claim for child support. The Respondent's motion was granted for all claims but dismissed with respect to the claim for child support for the child L.

Statutes, Regulations and Rules Cited:

Divorce Act, R.S.C. 1985, c. 3, s. 22(1), s. 22(2), s. 22(3)

Family Law Act, R.S.O. 1990, c. F.3, s. 15

Family Law Rules, O. Reg. 114/99, Rule 16(1), Rule 16(4), Rule 16(4.1), Rule 16(5), Rule 16(6)

Counsel

Niky Talebiani, for the Applicant.

Christopher Burrison/ Sydney Bunting for the Respondent.

ENDORSEMENT

E.L. NAKONECHNY J.

1 The Applicant brought an urgent motion returnable May 14, 2019, seeking the following relief:

a. that the motion be heard prior to a case conference;

b. that Ontario Courts have jurisdiction to hear this Application;

c. validating service of the originating pleadings on the Respondent or permitting service by email;

d. that the motion be heard without a factum filed;

e. to register a Certificate of Pending Litigation on property allegedly owned by the Respondent in Vancouver, British Columbia;

f. a non depletion order; and,

g. child support for the child, L., born May 22, 2000, on an imputed income to the Respondent of $250,000 per year on a without prejudice basis.

2 On May 14, 2019, Shore, J., made an order validating service of the originating pleadings and the motion material on the Respondent and permitting the support motion to proceed prior to a case conference. Her Honour adjourned the support motion to be heard after the Respondent's motion for summary judgment returnable May 30, 2019 and reserved costs to the judge hearing that motion.

3 I heard the parties' arguments on the Respondent's motion for summary judgment on May 30, 2019. I adjourned the Applicant's child support motion to be heard at 9 a.m. June 13, 2019 before me depending on my decision on the summary judgment motion.

4 The Respondent's summary judgment motion seeks an order dismissing the Applicant's Application issued December 6, 2018 and all of the Applicant's claims for spousal support, child support, equalization of net family properties and property relief and the Applicant's Notice of Motion returnable May 14, 2019, on the grounds that Ontario does not have jurisdiction to hear the claims.

5 The Respondent argues that he properly obtained a divorce in Sudan in accordance with the Islamic law of the Republic of Sudan on January 6, 2018, after the parties had lived separately there for at least seven years. The Applicant does not dispute that she was served with the divorce certificate in Sudan on January 13, 2018. She also does not dispute that the parties were married in Sudan in 1989, that their three children: N., age 27; M., age 23; and L., age 19, were born in Sudan and that the parties were both residing in Sudan at the time of their separation.

6 The Applicant states the date of separation was January 1, 2011. The Respondent states that the parties began living separate and apart in the same home in 2009 or 2010 and continued to do so until about 2017 when he moved to a rental apartment in Khartoum. He returned to the home in about February, 2018 to reside with L. while the Applicant was travelling to Kuwait and Dubai. She returned to Sudan in April or May, 2018. The Applicant and L. moved to Toronto in June 2018.

7 The Respondent's counsel attended court on May 14 and May 30 to argue the motions on his behalf but made clear that the Respondent was not attorning to the jurisdiction of Ontario until his motion for summary judgment had been heard and determined.

8 The Respondent's position is that an Ontario court does not have jurisdiction to hear a corollary relief proceeding for child support and spousal support under the *Divorce Act*, R.S.C. 1985, c. 3 or a spousal support claim made by a former spouse under the *Family Law Act,* R.S.O. 1990, c. F.3 following a valid divorce in a foreign jurisdiction. He argues that an Ontario court cannot adjudicate property rights under the *Family Law Act* when the parties' last common habitual residence is Sudan. He argues that Ontario should not presume jurisdiction over child support for a child over the age of majority who has only resided in Ontario for a few months. He states that Ontario is *forum non conveniens* and that the Applicant's claims for child support under the *Family Law Act* should be dismissed.

9 The Applicant's position is that the Ontario court should refuse to recognize the validity of the foreign divorce on the ground that the Applicant did not have notice of the proceeding and that the foreign divorce is contrary to public policy. She argues that, even if the divorce is found to be valid, she is still entitled to make a claim for equalization and child support under the *Family Law Act* and that this Court may exercise its *parens patriae* jurisdiction to make an order for child support for L. as she is a vulnerable child.

Background

10 The parties are both Sudanese citizens. They married in Khartoum, Sudan, on December 31, 1989. Their three children were born in Sudan. The two older boys attended school in Sudan until grade 9 and then went to boarding school and university abroad. Their daughter, L., attended school in Khartoum and graduated from grade 12 in June, 2018.

11 The Respondent deposes that he has not lived in British Columbia since 1977 or 1978 when he left Canada and

moved to Saudi Arabia. He has resided in Sudan since 1989 in a family home that he inherited from his late father. The parties and the children resided there during the marriage. After separation, the Applicant, the Respondent and L. continued to reside in that home.

12 The Applicant was a homemaker for 14 years. She returned to the workforce in 2004 and was a practicing dentist. The Respondent holds a minority interest in a number of shipping and importing companies within the Elbarbary Group of companies which were started by the Respondent's grandfather in Sudan. He was the primary income earner for the family during the marriage.

13 The Respondent's evidence is that all of his property interests are in Sudan with the exception of a minority interest in two apartments, one in Dubai and one in Egypt, and a minority interest in a holding company in British Columbia with his siblings, which owns shares of a numbered company that owns a tenanted commercial property in Richmond, British Columbia.

14 The Applicant claims a division of an interest she alleges the Respondent has in a property known municipally as 1128 West 49th Avenue, Vancouver. The family would stay in this property when they visited the Respondent's family in Canada before separation. The Respondent has produced evidence which shows that this property is owned by his sister, Kamilia Elbarbary, in her capacity as a trustee of the RD Trust. The RD Trust was settled by the Respondent's mother, Rawhia Darwish. Ms. Darwish was the sole owner of the property and transferred it into the trust in November, 2016. The trust holds the property for the benefit of the Respondent's mother.

15 The Applicant alleges that the Respondent travelled extensively for business out of Sudan. She states that up until about 2014 (at least three years after the Applicant's January 1, 2011 date of separation) the Respondent was travelling to British Columbia on a regular basis, paying taxes there, maintaining a residence to receive health care coverage and other benefits and held an interest in a company registered there. She alleges that the Respondent purposely took steps to become a non-resident of Canada to prevent the Applicant from bringing her Application for divorce and corollary relief in Canada.

16 The Respondent asserts that the Applicant told him she wanted a divorce numerous times since separation. The Applicant agrees but says she told the Respondent she wanted the divorce to proceed in Canada, not Sudan.

17 The Respondent's evidence is that he last visited British Columbia with L. in September, 2016. He states, and the Applicant does not deny, that the Applicant last visited British Columbia in 2005 and never returned to Canada until she and L. moved to Toronto in June, 2018.

18 While he does not admit the Applicant's allegations that he "cut his ties" with Canada to thwart her ability to bring a divorce Application in Canada, the Respondent states that if, as the Applicant argues, he stopped being a resident of British Columbia in about 2014, he must have been resident elsewhere after that date. He states that he was resident in Sudan throughout and has met the requirement of ordinary residence required for this court to recognize the Sudanese divorce.

19 The Applicant was served with the Sudanese divorce on January 13, 2018, by the Respondent's solicitor, Mr. Al Ameen Hashim, a lawyer licensed to practice law in Sudan. In his Affidavit dated May 4, 2019, Mr. Al Ameen Hashim confirmed that he personally served the divorce certificate on the Applicant on that day and spoke to her for about an hour to give her legal advice regarding the "future of all the children after divorce".

20 Mr. Al Ameen Hashim provided an Acknowledgement of Expert's Duty dated May 23, 2019 and his curriculum vitae. He provided a report dated May 4, 2019, setting out the law governing divorce proceedings and the rights of minor children in the Republic of Sudan as follows:

a. The husband alone has the right to divorce the wife as his own free will and then issue a certificate of divorce (divorce) from an authorized legal person licensed to practice this profession under the provisions of the personal status law for Muslims and has the right to issue divorce certificates.

b. A divorce document is issued by the legal authorized person will be issue with two adult witnesses who must sign the divorce voucher as witness.

c. The husband is not obliged to disclose in advance to the wife or take the consent of the divorcee, but he must hand over the certificate of divorce to her or her guardian, as the case.

d. The law applicable to rights of minors to clothing, food, maintenance, study and monthly expenses is the Personal Status Code for Muslims of 1991

21 The Sudanese proceeding was for a divorce only. The Respondent did not bring any claims regarding support or division of property.

22 The Applicant took no steps to appeal or dispute the divorce after she was served in January, 2018. There is no evidence she sought any legal advice in Sudan (beyond speaking with Mr. Al Ameen Hashim when she was served) or took steps to make any claims for spousal support or division of property in Sudan. The Applicant provided no evidence as to what her legal rights to make those claims would have been at the time she was served with the divorce or now.

23 L. was a minor at the time the Sudanese divorce was granted. She is now 19 years of age. I have no evidence of the age of majority in Sudan. The Applicant made no claims for child support for L. in Sudan under the Personal Status Code for Muslims of 1991. I have no evidence as to what claims the Applicant might have for child support for L. in Sudan now that L. is not resident in that jurisdiction and is over the age of 18.

Recognition of the Foreign Divorce

24 Sections 22(1) and 22(2) of the *Divorce Act* permit this court to recognize a foreign divorce where either spouse was ordinarily resident in the jurisdiction for at least one year prior to the commencement of the proceedings or where the wife was domiciled in the jurisdiction. Section 22(3) preserves the common law and conflict of law rules regarding recognition of foreign divorces.

25 There is a presumption in favour of the validity of a foreign divorce. The onus is on the party alleging that the divorce is invalid to adduce some evidence to establish that the divorce was not properly obtained: *Powell v. Cockburn,* [1977] 2 S.C.R. 218. Only in very rare circumstances will a foreign divorce properly obtained pursuant to the laws of another jurisdiction not be recognized by Canadian courts: *Martinez v. Basail,* 2010 ONSC 2038, 86 R.F.L. (6th) 210.

26 The Applicant does not dispute the validity of the Sudanese divorce in her Application in this proceeding issued December 6, 2018. In the section of the Application titled "Family History" the Applicant indicates that both parties were divorced in Sudan on January 6, 2018.

27 In her Affidavit sworn April 25, 2019 in support of her urgent motion returnable May 14, 2019, in the section headed "Property and CPL" the Applicant states that she was only informed of the divorce by the Respondent after the fact and that it was obtained without her knowledge. She does not oppose the validity of the divorce but raises it in this part of her affidavit along with other examples of the Respondent not being forthcoming with financial information and hiding his assets in support of her position that he is deceitful.

28 It is in her Affidavit sworn May 20, 2019, that the Applicant takes issue with the validity of the Sudanese divorce, not because it was not validly obtained through the legal process in Sudan, but that it was obtained in accordance with Islamic law which she argues is against Canadian public policy and because she did not have notice before it was obtained. The Applicant does not give any evidence that the granting of the divorce limited her ability to make property or support claims thereafter.

29 The parties were both domiciled in Sudan at the time the divorce proceeding was commenced and at the time the divorce was granted. The parties had a real and substantial connection to the jurisdiction where the divorce was

granted. The evidence of Mr. Al Ameen Hashim confirms that the divorce would be recognized by the law of Sudan where the parties were domiciled at the time of the divorce. Based on these factors, the Sudanese divorce would be recognized in Ontario: *Essa v. Mekawi,* 2014 ONSC 7409, 56 R.F.L. (7th) 133 at para. 59.

30 However, even where a foreign divorce judgment was properly obtained, there are a few, narrow defences to its enforcement. One recognized defence arises when the respondent did not have notice of the foreign proceeding and lacked the opportunity to respond to or defend the proceeding. In *Kadri v. Kadri,* 2015 ONSC 321, 59 R.F.L. (7th) 187, the foreign divorce was initiated without notice, but did provide the responding party with an opportunity to respond and oppose the divorce. The court stated: "This opportunity is of fundamental importance": para. 82. Concerns about lack of notice exist "particularly where the procedure consists only of a unilateral announcement of divorce by one party, usually the male, communicated to his then wife and not involving review or participation by a court of competent jurisdiction." The court ultimately found that the divorce was valid as "the [responding party to the divorce], albeit only in response, had an opportunity to respond and defend the grant of divorce": para. 85.

31 The evidence of Mr. Al Ameen Hashim confirms that the Respondent was not obligated to disclose the divorce in advance to the Applicant. He did not do so. That said, it is both parties' evidence that the Applicant told the Respondent she wanted the divorce for some time.

32 I do not accept as credible the Applicant's assertion that she told the Respondent she wanted the divorce to proceed in Canada. The parties never resided together in Canada during the marriage. By the Applicant's own evidence, the Respondent has not been a "resident" of Canada since about 2014. I do not need to make a finding as to whether he was or was not a resident before or at that time.

33 The divorce did not proceed until January, 2018. The Respondent was certainly not a resident of Canada for the required 12 month period prior to that date. The divorce could not have proceeded in Canada in 2018. It could only have proceeded in Sudan where the parties and L. were domiciled and where the majority of their property was situated.

34 Another defense to the enforcement of a foreign judgment is that it is contrary to Canadian public policy. In *Beals v. Saldanha,* 2003 SCC 72, [2003] 3 S.C.R. 416, the Supreme Court of Canada held: "The public policy defence turns on whether the foreign law is contrary to our view of basic morality": para. 73.

35 The Supreme Court made clear in *Beals* that an argument based on public policy should not succeed for the sole reason that the foreign jurisdiction would not or did not yield the same result as might occur in Ontario or Canada. At para. 76, the Supreme Court stated that the public policy defense "is not a remedy to be used lightly. The expansion of this defence to include perceived injustices that do not offend our sense of morality is unwarranted. The defence of public policy should continue to have a narrow application."

36 In *Zhang v. Lin,* 2010 ABQB 420, the Court refused to recognize a Texas divorce obtained by the husband which did not require him to pay either child support for an adult child still attending school or spousal support and which made an unequal division of matrimonial property on the grounds that it was contrary to Canadian public policy. The Court's objection was not to the granting of the divorce which both spouses wanted. The Court held that it would have recognized the divorce but for Texas' treatment of support for adult children and spouses.

37 The Sudanese divorce grants a divorce only. The Applicant's evidence is that the Respondent made no claims for support or property in that proceeding. The Applicant, herself, made no claims for property or support after she was served with the divorce. There is no evidence that the divorce affected the Applicant's right to advance those claims in a proceeding in Sudan in a way that might be contrary to Canadian public policy. It is also not clear whether the Applicant had an opportunity to respond, as in *Kadri,* despite the fact that the divorce was granted without notice.

38 The defences to enforcement of a validly obtained foreign judgment are narrow, and rarely applied. On the basis of the evidence before me, I find that the Applicant has not met her burden of proof to establish that the

Sudanese divorce was not properly obtained or that it should not be enforced on the grounds that she lacked the opportunity to respond or that the divorce is contrary to public policy.

39 On a motion for summary judgment, the responding party must put their best foot forward. The Applicant has failed to lead any evidence about the law of divorce in Sudan that would allow the court to conclude it is contrary to public policy or that she did not have an opportunity to respond or defend the divorce.

The Corollary Issues

40 Having found the Sudanese divorce to be valid, I now turn to the Respondent's motion for summary judgment on the Applicant's corollary relief claims.

41 Pursuant to Rule 16(1) of the *Family Law Rules,* O. Reg. 114/99 a party may move for summary judgment for a final order without a trial on all or part of any claim made or any defence presented in a case. If the Court is satisfied that there is no genuine issue requiring a trial of a claim or defence, Rule 16(6) mandates that the Court *"**shall**"* grant summary judgment.

42 Rule 16(4) requires the moving party to serve an affidavit or other evidence which sets out specific facts showing there is no genuine issue requiring a trial. Rule 16(4.1) provides that the party responding to the motion may not rest on mere allegations or denials but shall set out in an affidavit or other evidence, specific facts showing there is a genuine issue for trial. If this evidence is not from a person who has personal knowledge of the facts in dispute, the court may draw conclusions unfavourable to the party: Rule 16(5).

43 On a motion for summary judgment, the moving party must establish *a prima facie* case that there is no genuine issue requiring a trial. The onus then shifts to the responding party. It is not sufficient for the responding party to simply rely on allegations in their pleadings; they must set out, in affidavit material or other evidence, specific facts showing there is a genuine issue requiring a trial. The responding party cannot simply advise that further or better evidence may be available at trial. The responding party must "lead trump or risk losing" and put their "best foot forward": *Sweda Farms Ltd v. Egg Farmers of Ontario,* 2014 ONSC 1200 at paras. 26, 32, aff'd 2014 ONCA 878, leave to appeal to S.C.C. refused [2015] S.C.C.A. No. 97.

44 The Supreme Court of Canada in *Hryniak v. Mauldin,* 2014 SCC 7, [2014] 1 S.C.R. 87 held at para. 49:

> "There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result."

45 As confirmed by the Supreme Court of Canada in *Hryniak,* determination of a motion for summary judgment now involves a two-step approach:

1. The judge should first determine whether there is a genuine issue requiring trial based only on the evidence before him or her, without using the fact-finding powers. If there is no genuine issue requiring a trial, summary judgment "*must* be granted".
2. If there appears to be a genuine issue requiring a trial, the judge should then determine whether "the need for a trial can be avoided" by using the fact-finding powers to weigh evidence, evaluate credibility, and draw inferences: paras. 66-68.

Spousal Support

46 There is no genuine issue for trial with regard to the Applicant's claim for spousal support. The Applicant makes her claim for spousal support under the *Divorce Act* and the *Family Law Act.* This Court does not have jurisdiction to hear and determine a corollary relief proceeding under the *Divorce Act* following a valid divorce in a foreign

jurisdiction. It does not have jurisdiction to hear and determine a support claim made by a former spouse under the *Family Law Act*: *Okmyansky v. Okmyansky,* 2007 ONCA 427,86 O.R. (3d) 587 at paras. 31 and 42.

47 The Applicant's claim for spousal support must be dismissed.

Equalization and Property Division

48 The Respondent argues that s. 15 of the *Family Law Act* requires the Applicant's claim for equalization to be dismissed. Section 15 of the *Family Law Act* states that "the property rights of spouses arising out of the marital relationship are governed by the internal law of the place where both spouses had their last common habitual residence ..."

49 Section 15 of the *Family Law Act* sets out the conflict of laws rule to be applied to property rights as between married persons. It says nothing about in what circumstances jurisdiction exists or should be exercised in Ontario: *Knowles v. Lindstrom,* 2013 ONSC 2818, 42 R.F.L. (7th) 56 at para. 27.

50 In *Okmyansky,* the Ontario Court of Appeal held that Ontario has jurisdiction to determine equalization issues after a valid foreign divorce where the foreign judgment does not deal with property issues. This was recently confirmed in *Cheng v. Liu,* 2017 ONCA 104, 136 O.R. (3d) 172, where the Court of Appeal held that even if the foreign court had granted a valid divorce, the wife could claim under the *Family Law Act,* for equalization or child support where the foreign court had not dealt with those issues.

51 The *Family Law Act* does not speak to the issue of jurisdiction *simpliciter.* As the respondent is not present and has not attorned to in the jurisdiction of Ontario, whether this Court has jurisdiction to hear the Applicant's claims for corollary relief under the *Family Law Act* must be based on the third common law ground: a real and substantial connection: *Wang v. Lin,* 2013 ONCA 33, 29 R.F.L. (7th) 1 at paras. 18-22.

52 The burden is on the party asserting the court's jurisdiction. The test is met when a presumptive connecting factor is established that links the subject matter of the litigation to the forum. If none of the presumptive connecting factors apply, the court should not assume jurisdiction: *Wang* at para. 20, citing *Club Resorts Ltd. v. Van Breda,* 2012 SCC 17, [2012] 1 S.C.R. 572 at paras. 82-94 and 100.

53 In *Rubio v. Joslin,* 2018 ONCJ 167, 7 R.F.L. (8th) 240 O'Connell, J., following *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.), set out the factors the Ontario Court must consider in determining whether there is a real and substantial connection which gives the court jurisdiction to hear a corollary relief claim under the *Family Law Act* notwithstanding the existence of a valid foreign divorce. In this case, the following factors in determining a real and substantial connection are relevant:

a. The connection between the forum and the Applicant's claim. The Applicant has no property in Ontario save small amounts in a bank account. The Applicant has only resided here for just over 11 months.

b. The connection between the forum and the Respondent. There is no connection. The Respondent has never been to Ontario. He owns a minority interest in a family company in British Columbia. The Respondent does not own property known municipally as 1128 West 49th Avenue, Vancouver, British Columbia. It is not a matrimonial home as defined in Part II of the *Family Law Act.*

c. Unfairness to the Respondent in assuming jurisdiction. The Respondent earns income and owns property almost solely in Sudan. He would have to produce and translate financial documentation and business valuations into English and in Canadian dollars.

d. Unfairness to the Applicant in not assuming jurisdiction. The Applicant has provided no evidence as to what her property claims would be in Sudan and why she did not advance them there.

e. Whether the case is interprovincial or international. This case is international.

f. Comity of standards of jurisdiction, recognition and enforcement prevailing elsewhere. I have no evidence from the Applicant as to what her property claims would be in Sudan.

54 There is no genuine issue for trial related to the Applicant's property claims. On the evidence before me, I find that the Applicant has not met the burden of establishing that Ontario has a real and substantial connection to the equalization of net family properties and property claims made by her in the Application. The link to Ontario is tenuous, and is not sufficient for this court to exert jurisdiction over the Respondent. Further, on a *forum non conveniens* analysis, Sudan would be clearly the more appropriate forum as most of the property at issue is situated there, and the law of Sudan would apply to the proceeding under s. 15 of the *Family Law Act* even if it were to take place in Ontario.

55 The Applicant's property claims, including her claim for equalization; unequal division of the property known municipally as 1128 West 49th Avenue, Vancouver, British Columbia; a non-depletion Order; an accounting under sections 7 and 8 of the *Family Law Act;* an order for a post separation accounting and a division of the Respondent's pension are dismissed.

Custody and Access

56 There is no genuine issue for trial related to the Applicant's claim for custody and access. L. is 19 years old and resides with the Applicant. This court does not have jurisdiction to determine claims for custody and access where a child is over the age of majority: *Children's Law Reform Act,* R.S.O. 1990, c. C.12, s. 18(2).

57 The Applicant's claims for custody of and access to L. are dismissed.

Child Support

58 In *Cheng v. Liu, supra,* the Ontario Court of Appeal held that an Ontario court has jurisdiction to award child support under the *Family Law Act* after a foreign court has granted a valid divorce where the foreign court has not dealt with the issue. As I set out in paragraphs 50 and 51 above in my analysis of the Applicant's property claims, because the Respondent is not present in Ontario and has not attorned to the jurisdiction of Ontario, the Applicant has the burden of showing that there is a real and substantial connection between Ontario and the claim for child support.

59 The Applicant states that L.has chosen to live in Toronto and intends to do so permanently. The Applicant also states that L. is a full time student and, as a result, unable to withdraw from parental control. She states that L. is in need of child support.

60 The Applicant's Affidavits also allege that the Respondent was physically and mentally abusive to L. and that L. suffers from violence and abuse she witnessed her mother suffer during the marriage.

61 I am concerned that there is no direct Affidavit evidence from L. or any explanation as to why direct evidence was not produced. The Applicant has produced an Affidavit from Shirin Zanjani, a paralegal working at counsel for the Applicant's law firm, sworn May 24, 2019 on information and belief obtained through email correspondence with the Applicant and L. The Respondent asks me to draw an unfavourable conclusion against the Applicant pursuant to Rule 16(5) of the *Family Law Rules.*

62 The Applicant's own Affidavit sworn May 20, 2019 attaches an account statement from Seneca College issued April 1, 2019. This document lists the tuition and other costs for L. for the Fall 2018/Winter 2019 term. This is the only evidence I have that L. is in full time attendance in post-secondary education.

63 In applying the evidence to the factors in *Rubio v. Joslin* set out above, I find that the Applicant has met the burden of showing there is a real and substantial connection between Ontario and the Applicant's claim for child support for L. Although the Respondent still has no connection to Ontario by way of income earned or assets owned

here, there is a connection between the forum and the Applicant's claim for child support. L. is resident in Toronto and enrolled in a programme of education. The evidence is that she plans to continue her education here to graduation.

64 In balancing the unfairness between the parties, I find that there would a greater unfairness to the Applicant in this court not assuming jurisdiction over the child support claim for L. The Sudanese divorce did not deal with this issue so this court may take jurisdiction.

65 Having found that this court has jurisdiction to hear and determine the child support claim on the basis of a real and substantial connection, I need not deal with the Applicant's *parens patriae* argument.

66 Contrary to the Respondent's contention, I find that Ontario is not *forum non conveniens.* Indeed, it is questionable whether Sudan would take jurisdiction over this matter, given that the child is not present in the jurisdiction and all of the evidence about her needs and ability to contribute to her own support is in Ontario.

67 Based on the evidence before me, I find that there is a genuine issue for trial with respect to the Applicant's claim for child support for the child, L.

Disposition

68 For the reasons above, I make the following Order:

a. The Applicant's claims for spousal support set out in her Application in Toronto Court File Number FS-18-6822-00 issued December 6, 2018 are dismissed.

b. The Applicant's claims for custody of and access to the child L. born May 22, 2000 set out in her Application issued December 6, 2018 are dismissed.

c. All of the Applicant's claims for equalization of net family property and property relief set out in her Application issued December 6, 2018 are dismissed.

d. The Respondent's motion for summary judgment is granted in part, with respect to the above claims, but dismissed with respect to the claim for child support for the child L.

e. If the parties cannot agree on costs, the Applicant shall serve and file her submissions for costs within 7 days from the date of this decision. The Respondent will have 7 days thereafter to serve and file his submissions. The submissions shall be no more than three pages, exclusive of any costs outline, case law and offers to settle. The Applicant may serve and file Reply submissions of two pages 7 days thereafter. All submissions shall be served by email to the Applicant's counsel at niky@tzlawoffice.ca and to the Respondent's counsel at chris@csbhllp.com and sent to my assistant at Patrizia.Generali@ontario.ca.

E.L. NAKONECHNY J.
